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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-5276

ALBERT DELANOR MUREL, ET AL.,
Petitioners,

v.

BALTIMORE CITY CRIMINAL COURT AND DIRECTOR OF PATUXENT INSTITUTION, STATE OF MARYLAND, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

OPINIONS BELOW

1. *Sas, et al., v. State of Maryland, et al.*, 334 F. 2d 506 (4th Cir., 1964) (A. 1).
2. *Daniels v. Director*, 238 Md. 80, 206 A. 2d 726 (1965).
3. *Daniels v. Director*, Circuit Court for Prince George's County, #3110, Opinion December 15, 1965 (J.A. Md., 11).
4. *Director v. Daniels*, 243 Md. 16, 221 A. 2d 397 (1966), Cert. Denied, *sub. nom. Avey v. Boslow*, 385 U.S. 940, 87 S. Ct. 307, 17 L. Ed. 2d 219 (1966).

5. *Sas, et al., v. State of Maryland, et al.*, 295 F. Supp. 389 (D. Md. 1969) (J.A. 4, 5).

6. *Tippett, et al., v. State of Maryland, et al.*, 436 F. 2d 1153 (4th Cir., 1971) (A. 16).

JURISDICTION

The jurisdictional requisites are adequately set forth in Petitioners' Brief.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

Section 1.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ANNOTATED CODE OF MARYLAND

Defective Delinquents — Article 31B

§ 5. Defined

For the purposes of this article, a defective delinquent shall be defined as an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment. (An. Code, 1951, § 5; 1951, ch. 476, § 5; 1957, ch. 558; 1961, ch. 629, § 1.)

§ 6. Request for Examination

(c) *When requests may be made.* — Such an examination may be requested and made at any time after the person has been convicted and sentenced for a crime or offense specified hereinabove in this section, provided that the said person has been sentenced to a period of confine-

ment in a penal institution or is then serving such a sentence. No such examination shall be ordered or made if the said person has been released from confinement for the particular crime or offense of which he was convicted or who is within six months of the expiration of his sentence.

(e) *Custody after examination ordered; jurisdiction of defendant.* — After the court has ordered an examination to be made under this section, said person shall be retained in custody, initially of the Department of Correction until his transfer to Patuxent Institution and thereafter in the custody of Patuxent Institution, until such time as the procedures of this subtitle for the determination of whether or not said person is a defective delinquent have been completed, without regard to whether or not the criminal sentence to which he was last sentenced has expired. The court which last sentenced the defendant, whether or not the term of court in which he was sentenced has expired shall retain jurisdiction of the defendant for the purpose of any of the procedures specified in §§ 6, 7, 8 or 9 hereof, except that the Criminal Court of Baltimore City and the Circuit Court of Anne Arundel County shall for such purposes have jurisdiction of a person last sentenced by the Municipal Court of Baltimore City and the People's Court of Anne Arundel County, respectively. (1971, ch. 491.)

§ 7. Examination

(a) *By whom made; report of findings to court; time spent in institution, etc., credited on sentence.* — Any such examination shall be made by at least three persons on behalf of the institution for defective delinquents, one of whom shall be a medical physician, one a psychiatrist, and one a psychologist. They shall assemble all pertinent infor-

mation about the person to be examined, before proceeding therewith, including a complete statement of the crime for which he has been sentenced, the circumstances of such crime, the court in which he was sentenced, the nature of the sentence, copies of any probation or other reports which may have been made about him, and reports as to his social, physical, mental and psychiatric condition and history. On the basis of all the assembled information, plus their own personal examination and study of the said person, they shall determine whether in their opinion, or in the opinion of a majority of them, the said person is or is not a defective delinquent. They shall state their findings in a written report addressed to the court, not later than six months from the date said person was received in the Institution for examination, or three months, before expiration of his sentence, whichever first occurs. If the substance of the report is that the said person is not a defective delinquent, he shall be retained in the custody of the Department of Correction under his original sentence as if he had not been examined for possible defective delinquency. Provided, however, that the said person shall be returned to the custody of the Department of Correction with full credit for such time as he has already spent in the institution for defective delinquents or within the custody of the Department of Correction including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of § 688 of Article 27 of the Code. (1971, ch. 491.)

(b) *Additional examinations by psychiatrist in certain cases.* — In addition to the examination provided in the foregoing subparagraph (a), whenever a request has been made to examine any person for defective delinquency, other than a request made by such person himself or by

his attorney on his behalf, and whenever the court has on its own initiative ordered examination of any person, then such person shall be entitled, upon request, to be examined by a practitioner of psychiatry of his own choice for the purpose of determining whether he is a defective delinquent within the terms of this article; and the reasonable costs of such examination shall be defrayed by the State of Maryland from the appropriations to the judiciary, in such amount as may be approved by the court. The report of examination made by such psychiatrist shall be submitted in writing addressed to the court. (An. Code, 1951, § 7 ; 1951, ch. 476, § 7; 1957, chs. 558, 762; 1961, ch. 629, § 1; 1963, ch. 283.)

§ 8. Hearings

(a) *When required; defendant to be advised of right to counsel.* — If the institution for defective delinquents in its report on any person shall state that he is a defective delinquent, the court shall forthwith summon the person before it and advise him of the substance of the report and of the pendency of the hearing hereinafter provided; the court shall further advise him of his right to be represented at said hearing by counsel of his choice, or if he has no choice, by competent counsel appointed by the court.

(b) *Appointment and rights of counsel.* — Unless appearance of counsel chosen by the person is entered within twenty days following the proceeding set forth in subsection (a) hereof, the court shall appoint counsel to represent the person. Counsel for the person and for the State shall have access to all records, reports and papers of the institution relating to the person, and to all papers, in the possession of the court bearing upon the person's case, including a copy of the report of the institution.

(c) *When hearing held; jury.* — The hearing for determination of defective delinquency shall be held no less

than thirty days following designation of counsel, unless acceleration of the time is requested by the person or his counsel. Upon the application of the State or of the person for a jury trial, or upon its own motion, the court shall empanel a jury of twelve persons to be selected by the court from the jurors then in attendance upon said court; or if the court is in recess, the jurors shall be selected from those in attendance at the term of court at which said petition is heard. The court shall direct such jury after hearing to find specially, by its verdict, whether the person is a defective delinquent as defined in § 5. In the absence of request for finding by a jury, the court may make such determination sitting as judge and jury. (An. Code, 1951, § 8; 1951, ch. 476, § 8; 1957, ch. 762; 1960, ch. 43, § 3; 1961, ch. 629, § 1; 1963, ch. 283.)

§ 10. Petition for Review

(a) *Who may file; hearing and determination.* — After any person shall have been committed under § 9 (b) as a defective delinquent, shall have been confined for two years after such commitment, and shall have been confined for a total period, including any period of confinement under his original sentence prior to commitment under § 9 (b), equal to two thirds of his original sentence, such person or anyone in his behalf, including the director or any officer or employee of Patuxent Institution, may file a petition requesting that such person be brought before the court in which such petition is filed for the purpose of having the defective delinquency of such person redetermined. Such a petition may be filed in the law courts of the county or Baltimore City, as the case may be, either where such person was originally sentenced or which was the bona fide residence of such person when originally sentenced. The court shall forthwith proceed to hear and determine the matter. If the person so con-

fined, or anyone in his behalf, shall pray a jury trial, the court shall empanel a jury of twelve persons to be selected by the court from the jurors then in attendance upon said court; or if the court is in recess, the jurors shall be selected from those in attendance at the term of court at which said petition is heard. Any party in interest shall have the right to counsel and to process to compel the attendance of witnesses. If the court or jury, as the case may be, shall determine that such person is a defective delinquent, the court shall order said person recommitted to the institution from which he immediately came; otherwise he shall be discharged from such confinement and custody, or in the discretion of the court committed under his original sentence, less such time as he has already served in the institution for defective delinquents or within the custody of the Board of Correction, including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of § 688 of Article 27 of the Code which shall apply to such person's period of commitment to Patuxent Institution with any variation of the regulations issued under said section as the Board of Correction shall consider appropriate in the particular case.

(b) *Application for further review not to be made within three years.* — After the right to apply for any such petition for review under the provisions of this section shall have been exercised once, it shall not again be sought under the provisions of this section within less than three years following the prior seeking of a petition for review from confinement under the same commitment.

(c) *Right to petition for habeas corpus not affected.* — The right to review specified in this section shall not be construed to deprive the defendant of his right to petition

for habeas corpus as it might otherwise exist. (An. Code, 1951, § 10; 1951, ch. 476, § 10; 1957, chs. 378, 762; 1961, ch. 629, § 1.)

QUESTIONS PRESENTED FOR REVIEW

1. Whether the definition of defective delinquent is unconstitutionally vague?

2. Whether the procedures embodied in the statute and in trial are applied in such a manner as to offend the due process requirements of the Fifth Amendment and the confrontation requirements of the Sixth Amendment?

3. Whether the objectives of the Act are sufficiently implemented to support its characterization as a civil procedure in order to satisfy constitutional safeguards, and whether Patuxent Institution does provide actual treatment to distinguish it from conventional penal institutions so as to satisfy the equal protection clause of the Fourteenth Amendment?

4. Whether the Eighth Amendment provision against cruel and unusual punishment is offended when those who commit crimes against property only as opposed to crimes of violence against the person are determined to be defective delinquents?

5. Whether Petitioners were deprived of due process and equal protection when they were denied leave to employ independent psychiatric experts at the government's expense before the District Court, and whether they were denied due process and equal protection when they were denied an independent psychiatrist prior to a finding of defective delinquency by Patuxent Institution?

6. Whether Petitioners were denied due process of law by referral to Patuxent Institution for examination and

determination as to their status as defective delinquents without notice hearing, or assistance of counsel?

7. Whether Petitioners were deprived of due process during the examination stage at Patuxent Institution when they were found to be defective delinquents and whether the same were unreliable findings of fact?

8. Whether Petitioners' privilege against self-incrimination is violated by requiring them to submit to an examination pursuant to Article 31B?

9. Whether Petitioners' rights to confrontation under the Sixth Amendment are abridged by the hearings held pursuant to Article 31B?

10. Whether the standard of preponderance of evidence violates due process?

11. Whether Petitioners were denied constitutional guarantees in the review procedures and annual examinations by the Institutional Board of Review?

12. Whether the United States District Court for the District of Maryland and the United States Court of Appeals for the Fourth Circuit erred in finding that the Act was constitutional on its face, interpretation, application, administration, and results?

APPENDIX DESIGNATION

The parties have agreed to the use of the appendixes heretofore used in the United States Court of Appeals for the Fourth Circuit and the Court of Appeals of Maryland. The two volume Joint Appendix used in the United States Court of Appeals for the Fourth Circuit will be hereinafter designated as "(J.A. 4)."

The two volume Joint Record Extract used in the Court of Appeals of Maryland which was accepted in evidence before the United States District Court for the District of Maryland in *Sas et al. v. State of Maryland, et al.*, 295 F. Supp. 389 (D. Md. 1969) will be hereinafter designated as "(J.A. Md.)."

Exhibits not printed in the Joint Appendix or the Joint Record Extract will be designated as Petitioners or Respondents Exhibit in the District Court or Courts Exhibit in the Circuit Court for Prince George's County.

STATEMENT OF THE CASE

History of Litigation

Petitions were filed in the United States District Court for the District of Maryland (hereinafter "District Court") by Petitioners Murel, Creswell and others, alleging that Article 31B, Annotated Code of Maryland, commonly known as the "Maryland Defective Delinquent Act" was unconstitutional. The District Court, Judges Roszel C. Thomsen, Harrison L. Winter and R. Dorsey Watkins, sitting separately, denied the petitions without a hearing and Petitioners appealed to the United States Court of Appeals for the Fourth Circuit (hereinafter "Fourth Circuit") from those decisions.

The Fourth Circuit considered the petitions in *Sas v. Maryland*, 334 F. 2d 506 (4th Cir., 1964) and held that the Act was facially constitutional stating that "[A]n examination of the trial and hearing provisions of the Act can leave no doubt that it places around the accused more procedural safeguards than any of the Acts of a similar nature which have been upheld by the courts against this attack." *Sas, supra*, 334 F. 2d at 515. The Fourth Circuit remanded the consolidated petitions for habeas corpus relief by the five patients committed to Patuxent Institu-

tion for consideration of the challenges made by Petitioners therein. The District Court was specifically directed to determine the following questions:

1. Whether the statutory definition of a defective delinquent as applied by the Maryland Court is sufficiently definitive to permit its practical application within constitutional limitations.

2. Whether the procedures embodied in the statute are applied in such a manner as to afford due process to the accused within the confrontation requirements of the Sixth Amendment.

3. Whether the proposed objectives of the Act are sufficiently implemented in its actual administration to support its categorization as a civil procedure and justify the elimination of conventional criminal procedural safeguards citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963).

4. Whether the interpretation and application of the statutory requirements that a defective delinquent be found to be an actual danger to society may within the Eighth Amendment's prohibition against cruel and unusual punishment include those whose conduct indicates no more than a danger to property rights as distinguished from violence to the person.

5. Whether Patuxent Institution does in fact furnish treatment for treatable defective delinquents as distinguished from other lawbreakers which would support the Act under the equal protection clause of the Fourteenth Amendment. *Sas, supra*, 334 F. 2d at 509.

Subsequently, other habeas corpus cases by patients of Patuxent Institution were remanded by the Fourth Circuit and consolidated with the original *Sas* cases. Counsel were appointed for the twelve petitioners and it was agreed between the court, counsel for Petitioners and counsel for the State that the prosecution of the *Sas* cases be deferred in view of *Daniels v. Director*, 238 Md. 80, 208 A. 2d 728 (1965).

In *Daniels v. Director, supra,* the Court of Appeals of Maryland remanded that case to the Circuit Court for Prince George's County (hereinafter "Circuit Court") for a determination of whether Petitioner Daniels was being subjected to cruel and unusual punishment by being compelled to endure a "life sentence" for "a petty property offense" and further stated that the Circuit Court should determine ". . . whether his continued detention at Patuxent is a violation of his constitutional rights, *Sas v. Maryland,* 334 F. 2d 506 (4th Cir. 1964)" and instructed the Circuit Court to make provision for an adequate record of the proceedings, explicit findings of fact and conclusions of law. *Daniels v. Director,* 238 Md. at 84.

Murel v. Director, 240 Md. 258, 213 A. 2d 576 (1965) before the Court of Appeals of Maryland following a redetermination hearing where Mufel was recommitted to Patuxent Institution also raised questions as to the constitutionality of Article 31B and as to whether Murel was receiving effective treatment for defective delinquency. Regarding this latter point, the Court of Appeals remanded Murel to await the final outcome of *Daniels, supra,* but broadened the scope of review in *Daniels, supra,* to be as broad as the constitutional issues outlined by the Fourth Circuit in *Sas, supra,* 334 F. 2d. *Murel, supra,* 240 Md. at 260-261.

The Circuit Court followed the instructions contained in *Daniels, supra,* and *Murel, supra,* and devoted eight days to hearing oral testimony from medical and other experts, the record ultimately covering 895 printed pages of testimony and 64 exhibits. The Circuit Court filed its opinion and findings of fact on December 15, 1965 and found the Act valid on its face, in its interpretation and application. The opinion of the Circuit Court was appealed to the Court of Appeals of Maryland which affirmed the decision and

adopted the opinion of the Circuit Court and its appendixes containing the Circuit Court's findings of fact and trial summary as its reasoning. *Director v. Daniels*, 243 Md. 16, 221 A. 2d 394 (1966) Cert. Denied, *sub. nom. Avey v. Boslow*, 385 U.S. 940, 87 S. Ct. 307, 17 L. Ed. 2d 219 (1966).

Following the decision of the Court of Appeals of Maryland in *Director v. Daniels, supra*, the District Court ruled that the record before the Court of Appeals of Maryland would constitute a part of the record before the District Court and that supplementation by either side would be permitted. Interrogatories were filed and answered and a hearing was held which lasted four trial days. The District Court considered all the questions raised by the Fourth Circuit and itself raised and considered the following questions:

> 1. Whether the statute, though fair on its face and impartial in appearance is being administered in the spirit in which it was conceived and has not become a mere device for warehousing the obnoxious and antisocial elements of society.
>
> 2. Whether deficiencies in staff, facilities, and finances have undermined the efficacy of the institution and the justification for the law and the constitutionality of its application. *Sas, supra*, 295 F. Supp. at 393.

The District Court found ". . . as a fact, and conclude[d] as a matter of law, that the Maryland Act is not only constitutional on its face, but also in its interpretation, application, administration and results." *Sas, supra*, 295 F. Supp. at 420.

Petitioners appealed the decision of the District Court to the Fourth Circuit, which considered the questions raised by it in *Sas, supra*, 334 F. 2d, the additional questions raised and answered by the District Court, and affirmed the deci-

sion of the District Court. *Tippett v. State of Maryland*, 436 F. 2d 1153 (4th Cir., 1971).

Petitioners filed a Petition for a Writ of Certiorari in this Court on May 28, 1971; the State filed a Memorandum in Opposition and this Court granted the Writ of Certiorari on December 20, 1971.

History of Act

Those involved in corrections long recognized that a group of offenders exist whose crimes result from a mental abnormality or character defect and who have long histories of persistent antisocial conduct resulting from lack of emotional control and sometimes accompanied by deficient intelligence. It had been found that they did not respond nor were they influenced by normal penological methods. It was early recognized that these individuals should not be incarcerated in conventional penal institutions but should be placed in a special institution staffed by professionals, that is, psychiatrists, psychologists, sociologists and social workers ". . . for the purpose of changing and rehabilitating the character and personality make-up of the person so that upon his release, he will, hopefully, assume a useful role in society." *Director v. Daniels, supra*, at 51.

> "The Defective Delinquent Act of Maryland is the end result of a series of studies made in Maryland between 1948 and 1950. In 1947 the legislature authorized and directed the Governor to appoint a commission consisting of doctors, judges, psychiatrists, psychologists and lawyers to study the problems of medical-legal psychiatry raised by recidivism. On December 28, 1948, the commission completed its work and submitted a report.
>
> Meanwhile, the Maryland Board of Corrections had appointed a special advisory committee of seven eminent psychologists and psychiatrists to study the

> same general problem and this committee rendered its report in January 1949. Ultimately, the two groups made a joint recommendation that a new institution should be set up for 'criminal, mental and emotional defectives', such institution to include a unit to function as a diagnostic clinic. It further recommended an indeterminate sentence law for criminal defectives to fulfill the purposes of the new institution. Thereafter, the Legislative Council of Maryland appointed a committee on medico-legal procedure, charged with the responsibility of making a study of the joint recommendations of the commission and the committee, and of drafting the proposed legislation. In 1951, the bill prepared by this committee was passed by the legislature with a few minor amendments as the Defective Delinquent Act of Maryland and codified as Article 31B of the Annotated Code of Maryland (1951)." *Sas, supra*, 334 F. 2d at 510. See also "Research Report No. 29," Research Division of the Legislative Council of Maryland, (December 1959); *Director v. Daniels, supra*, at 50-52.

The purposes of the Act were to protect society by identifying and treating those individuals who medical science could show would commit other offenses if confined untreated to the normal penological system and released. Particular success with this type institution was shown at Herstedvester in Denmark which produced an amazingly low recidivism rate in treating individuals who met the definition in Article 31B, Section 5. See generally "Research Report No. 29", *supra*.

> "In its essence, the statute rejects the age old concept that every legally sane person possesses in equal degree the free will to choose between doing right and doing wrong. Instead, it substitutes the concept that there is a category of legally sane persons who by reason of mental or emotional deficiencies 'evidence a propensity toward criminal activity' which they are incapable of controlling. For those in the category

> who are treatable it would substitute psychiatric treatment for punishment in the conventional sense and would free them from confinement, not when they have 'paid their debt to society' but when they have been sufficiently cured to make it reasonably safe to release them. With this humanitarian and progressive approach to the problem no person who has deplored the inadequacies of conventional penological practices can complain." *Sas, supra,* 334 F. 2d at 516.

A defective delinquent is defined as ". . . an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity and is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment." *Article 31B,* Section 5.

The Act sets up a comprehensive scheme for referral, examination, commitment and release. The request for examination can be made only subsequent to the imposition of an active prison sentence on conviction of a felony; a penitentiary misdemeanor; a crime of violence; a sex crime involving physical force, violence, or disparity of age between an adult and minor; a sexual act of uncontrolled or repetitive nature, or two or more convictions for any crime punishable by imprisonment. Article 31B, Section 6(a). Requests for examinations may be made by the Department of Corrections, the State's Attorney who prosecuted the crime, the individual, his attorney, or the Court. Article 31B, Section 6(b). A request for examination cannot be made if the individual has been released from confinement for the particular crime or who is within six months of the expiration of the sentence. Article 31B, Section 6(c). Following referral to Patuxent Institution,

the individual is examined by a physician, a psychiatrist and a psychologist who are required to report their findings to the court ". . . not later than six months from the date said person was received in the institution for examination, or three months, before expiration of his sentence, whichever first occurs." Article 31B, Section 7(a). If the report of the institution is that the individual is not a defective delinquent, he is returned to the Department of Corrections to complete the service of his original sentence with full credit for time spent at Patuxent Institution. Article 31B, Section 7(a). If the finding of Patuxent Institution is that the individual is a defective delinquent, he is given a full and prompt judicial hearing at which he is entitled to counsel, trial by jury, the services of an independent psychiatrist at the expense of the state, and full access to all records, reports and papers in possession of Patuxent Institution. Article 31B, Section 8(a), (b), (c). If the court or jury finds the individual to be a defective delinquent, he is committed to Patuxent Institution for an indeterminate period with the right of judicial review after the expiration of the greater of two years or two-thirds of his original sentence and at three year intervals subsequent to the original redetermination. Article 31B, Sections 9(b), 10(a), (b). If the court or jury finds that he is not a defective delinquent, he is returned to the custody of the Department of Corrections to serve his original sentence with full credit for the time spent at Patuxent Institution. Article 31B, Section 9(a). Appellate review of original or redetermination hearings is preserved. Article 31B, Sections 11, 11A.

The Act further provides that each inmate's classification shall be reviewed at least once each year by the Institutional Board of Review and further review is available through the use of the writ of habeas corpus. Article 31B, Section 13(b) and Section 10(c).

The Institutional Board of Review has the power to grant status, that is, leaves of absence, holiday leave, work release and paroles and to report to the committing court when it finds the patient no longer a defective delinquent. Article 31B, Section 13 (b), (d), (e), (f).

It may also recommend release of the patient unconditionally without regard to whether his original sentence is still in effect. Article 31B, Section 13(f).

The Act provides a multitude of safeguards for an individual referred to Patuxent Institution.

"1. He must be convicted and sentenced in a Maryland Court for a crime.

2. The crime must be of a particular category: (a) a felony or (b) a misdemeanor punishable by imprisonment in the penitentiary or (c) one of violence, or (d) a sex crime involving physical force, disparity of age, or of an uncontrolled or repetitive nature, or (e) two or more convictions for offenses punishable by imprisonment in a criminal court of this State.

3. There must be a request for examination by: (a) the Department of Correction, (b) the State's Attorney's office, (c) such person himself, (d) his attorney, or (e) the Court.

4. The Court must order the examination.

5. A copy of the order for examination must be served on the person to be examined.

6. The person must still be confined.

7. The examination must be made by at least three persons, one of whom must be (a) a medical physician, one a (b) psychiatrist and one a (c) psychologist.

8. A majority of the examiners must conclude that the person is a defective delinquent.

9. The person is entitled on request to be examined by a private psychiatrist of his own choice at the expense of the State unless he, himself, has asked for the original examination.

10. The person must, after the examination with an affirmative result, be brought before the Court and advised of the substance of the report and the pendency of the hearing.

11. He is entitled to counsel of his choice, or to competent counsel appointed by the Court.

12. Counsel has access to all records, reports and papers of the institution relating to the person and to all papers in the possession of the Court bearing on his case.

13. The person has a choice of a court or jury trial.

14. He may make application for leave to appeal from the order holding him to be a defective delinquent, although such appeal does not lie as a matter of right.

He, in addition to the specific statutory safeguards, has full opportunity to summon witnesses and to present evidence. Also, he has available to him all discovery procedure permitted under the Maryland Rules in civil cases, which is much broader than in criminal cases, including the taking of depositions, the use of interrogatories and demands for admission of facts."

Director v. Daniels, supra, 243 Md. at 43-44; See also, *Sas, supra,* 295 F. Supp. at 406-407.

Treatment

The purpose of the treatment program at Patuxent Institution is to ". . . develop internal controls within the individual in order that he may learn sufficient restraint to become a useful member of society. Otherwise stated, such aim is to enable defective delinquents, through treatment, to control their tensions, and more specifically, to help the individual gain insight into his behavior, to accept responsibility for himself and others, to adjust with relationship to his peers and authority figures, to tolerate frustration and postpone gratification of instinctional demands." *Director v. Daniels, supra,* 243 Md. at 58. Treat-

ment at Patuxent Institution consists of a total therapeutic program incorporating psychotherapeutics, educational, vocational, religious and recreation programs and a highly structured social system or therapeutic milieu. A graded tier system with tier counselling was evolved to reward socially desirable behavior. Defective delinquents are unable to internalize their conflicts and act out their antisocial behavior. It has been found that it is impossible to properly treat such individuals in a conventional mental hospital or conventional penal institution.

As set forth in *Director v. Daniels*, 243 Md. at 60-61, proper treatment for these individuals necessitated that they be treated in a separate institution that was neither a hospital nor a penal institution.

> "Patuxent presently provides effectual treatment for all treatable defective delinquents . . . denying treatment to none in that:
>
> (1) Patuxent's professional staff is adequate and competent as beginning August 15, 1965, the institution was authorized to employ 12 full-time psychiatrists (9.58 being then employed), 9 psychologists (5.5 being then employed), and 14 social workers (13 being then employed). With 485 patients on August 15, 1965, the professional staff to patient ratio was in full compliance with mental hospital staff standards promulgated by the American Psychiatric Association, and was materially higher than such ratios prevailing in the state penal and correctional institutions and in state mental hospitals in Maryland, as well as elsewhere in the country generally. Additionally, professional services of Patuxent's various advisory boards are available and are of value in the treatment program.
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> (5) All inmates are considered treatable and susceptible of help at Patuxent and the institu-

tion uses most of the recognized psychiatric treat ment techniques. Upon entry each inmate is especially assigned to a psychiatrist and a social worker.

(6) Group therapy which now enjoys almost universal acceptance, and in which use Patuxent pioneered, is now generally considered by experts to be the most effective form of treatment for defective delinquents. Presently 86% of the committed patients are regularly receiving this form of psychotherapy. All patients are afforded an opportunity to receive such therapy and *non-participation is due either to recent commitment, improper attitude or outright refusal.*

(7) Individual therapy is also provided at Patuxent on a selective basis, but presently only four inmates are receiving this form of therapy, as experience there has demonstrated that defective delinquents generally do not respond well to this form of therapy." (Emphasis supplied)

Although early writings indicated that there was some understaffing at Patuxent, the testimony before the courts below show that Patuxent is now adequately staffed. (See Court Exhibit Nos. 2 and 61 B — Circuit Court) (J.A. Md., 814-840, 884-891) (J.A. 4, 212) Patuxent Institution has magnified and intensified its therapy through the creation of unit treatment teams which allow patients continuing therapy within the group so that the loss of a member of the unit treatment team does not disrupt therapy (J.A. 4, 179-180, 183-185). Patuxent Institution also provides holiday and leave status, a half-way house which provides meaningful psychiatric after care to parolees and has pioneered in vocational rehabilitation, speech therapy, and work release programs (J.A. 4, 174-178, 318). As indicated in the record below, treatment at Patuxent Institution is available to everyone (J.A. Md., 119, 215, 221-224, 287, 385,

387, 407, 636, 643) (J.A. 4, 173-175, 178-186, 252, 259, 261-268, 293-294, 313, 317, 327, 342, 344).

Patuxent Institution is one of the few facilities with single cells for patients which eliminates much of the horror of other correctional facilities (J.A. 4, 318). "The initial cost of the institution was $3,902,000 and the total cost of the physical plant to the present amounts to $7,-579,560. The facility is located about mid-way between Baltimore and Washington, at Jessup, Maryland, is comprised of ten acres, fenced. Facilities include six guard-houses, a multi-sectioned three-story defective delinquent building, a three-story diagnostic center, a kitchen-dining room, a gymnasium-theater, vocational shops and school area, a hospital (containing laboratory facilities including electroencephalographic and electrocardiographic rooms, dental offices, examination and treatment rooms), administrative offices, a psychiatric isolation section, as well as other structures and units. The entire complex is interconnected by a ground-level tunnel." *Director v. Daniels, supra*, 243 Md. at 52. Additional improvements since that time consist of a school building, chapel, additional shop space and a half-way house located in Baltimore City.

Petitioners

Albert Delanor Murel

Albert Murel was convicted in the Criminal Court of Baltimore of burglary by Judge Emory H. Niles and sentenced to one year imprisonment from September 10, 1961. On April 23, 1962, under the old Article 31B, Section 6(c), he was transferred to Patuxent Institution for examination and evaluation as to his status as a defective delinquent. He was committed to Patuxent Institution following a court trial in the Criminal Court of Baltimore before Judge Wilson K. Barnes on November 30, 1962. Murel's history of

criminal activity started as a juvenile at age 12, when he was charged with attempted burglary and placed on probation. He was later committed as a delinquent for two periods of ten months each. As an adult, his initial criminal conviction was for larceny, for which he received probation in 1959. Thereafter, he was twice convicted and received jail sentences of 60 days each for larceny, serving this time in the Baltimore City Jail. Almost immediately after release, he was convicted of breaking and entering and sentenced to one year imprisonment. His next involvement with the law is the one which led to his present confinement. Murel had a redetermination hearing in the Criminal Court of Baltimore before a jury, Judge Michael Manley presiding and was recommitted to Patuxent Institution on December 21, 1964.

Murel's adjustment to the Patuxent Institution was extremely difficult. On two occasions he was transferred to the Clifton T. Perkins State Hospital following hallucinations and suicidal ideas. Examinations at Patuxent Institution indicate that his problems are highlighted by his emotional instability and complete lack of judgment. He has strong paranoid ideatons, having ideas of persecution and grandiosity and a strong dependence on medications, especially barbiturates. Murel's condition was manifested all too frequently with his lack of contact with reality and hallucinations.

Murel was released from Patuxent Institution and all custody on July 7, 1971 following a redetermination hearing in the Criminal Court of Baltimore by Judge Robert B. Watts. (Res. Ex. 4, District Court).

Robert N. Hayes, Jr.

Robert N. Hayes, Jr., had an extensive juvenile record including robbery, escape, breaking and entering and larceny.

As an adult, he was convicted in the Criminal Court of Baltimore of robbery and assault with intent to rob, and received consecutive sentences of seven years and seven and one-half years by Judge H. Ralph Warnken in 1954. He initially began to serve his sentence in the Maryland State Reformatory, but his adjustment was extremely poor. He assaulted other inmates and custodial officers and on two occasions made unsuccessful suicidal attempts. He escaped from the Maryland State Reformatory and received an additional sentence of six months following conviction. During his stay in the Reformatory it was necessary on four separate occasions to place him in the mental observational ward. He was eventually transferred to Crownsville State Hospital as the result of his behavior at the reformatory. He remained there for a year and was returned to the reformatory in May, 1958. He was subsequently transferred to the Maryland Penitentiary because of his inability to properly adjust to the reformatory. At the penitentiary his adjustment followed the same course. He cut an inmate with a piece of glass and attempted to cut a custodial officer with a homemade knife. During his stay at the penitentiary he set fire to his bed and cut his arm with a razor blade. He was again transferred to Crownsville State Hospital in May, 1959 where he remained for approximately six months before his return to the Maryland Penitentiary. In 1960 a further series of incidents occurred at the penitentiary regarding Hayes. He again set his bed on fire and defecated on his cell floor. He was transferred to Crownsville State Hospital remaining there until March 1960 when he was transferred to Clifton T. Perkins State Hospital. Hayes was eventually transferred from there to the Patuxent Institution for evaluation and determination as to his status as a defective delinquent on October 4, 1960. He was committed to the Patuxent Institution as a defective delinquent following a jury trial in

the Criminal Court of Baltimore, Judge Michael E. Manley presiding, on November 10, 1961 but was released on a writ of habeas corpus on September 24, 1963. Hayes was subsequently convicted of forgery and possession of a deadly weapon for which he received concurrent eighteen month sentences on each conviction and was sent to the Maryland House of Correction. Following his release, he was convicted on September 5, 1965 of storehouse breaking in the Criminal Court of Baltimore, without a jury, Judge James A. Perrott presiding, and received eight years imprisonment. He was again referred to Patuxent Institution and has refused all attempts at evaluation.

The files at Patuxent Institution indicate that Hayes has been diagnosed as a schizophrenic reaction-paranoid type. There is also evidence of chronic brain syndrome with epilepsy associated with psychotic episodes. He is a highly emotional, disturbed individual who is unable to adequately perceive reality. Hayes functions under great turmoil and if released to society would respond with aggressive and antisocial behavior in order to reduce some of the tension under which he functions. It is therefore more than evident that he qualifies as a defective delinquent.

George Lewis Creswell

George Lewis Creswell was convicted of breaking and entering and larceny in the Circuit Court for Cecil County by Judge E. D. E. Rollins and sentenced to two years imprisonment from July 11, 1958. At sentencing, he was ordered by Judge Rollins to Patuxent Institution for examination and determination as to his status as a defective delinquent and was thereafter committed as a defective delinquent following a court trial, Judge Rollins presiding, in the Circuit Court for Cecil County on March 6, 1959.

Creswell's previous history of criminal involvement was all as a juvenile. It began at the age of 13 when he broke into a factory and several homes and was placed on probation. Later, again breaking into houses, he was committed to the Maryland Training School for Boys where he remained for approximately one year. Upon release, he immediately stole a car, again broke and entered houses and was again committed to the Maryland Training School. When he was released approximately one year later in 1958 he immediately got into difficulty again, committing a breaking and entering and larceny, which resulted in his present convictions. Creswell has had three redetermination hearings all before juries in the Circuit Court for Cecil County, and was recommitted to Patuxent Institution on the following dates: 1) September 20, 1961, Judge E. D. E. Rollins presiding; 2) January 25, 1966, Judge George B. Rasin, presiding, and 3) March 7, 1970, Judge J. Albert Roney presiding.

The reports from Creswell's file at Patuxent Institution indicate that he is a mental defective. His attitude toward society is rebellious and utterly antagonistic which, because of his poor intellectual endowment, makes him quite dangerous to society and little help to himself. His initial adjustment to Patuxent Institution was stormy but he eventually began to participate and at the time of the hearing in the District Court had been released on parole status and voluntarily came in to court to testify (J.A. 4, 59-67). Following his parole on April 22, 1968 he again got into difficulty. He was convicted on January 7, 1969 of conspiracy to escape, attempt to escape and assault and battery in the Circuit Court for Cecil County by a jury, Judge H. Kenneth Mackey presiding and sentenced to three concurrent two year sentences on each conviction. On January 8, 1969 he was convicted of receiving stolen goods and storehouse

breaking by a jury, Judge H. Kenneth Mackey presiding, and received two years imprisonment for receiving stolen goods and ten years imprisonment for storehouse breaking, the sentences to run consecutively. His parole was revoked on October 2, 1968 and he was returned to Patuxent Institution (Res. Ex. 2. — District Court).

Bradley Arlington Avey

Bradley Arlington Avey was convicted in the Circuit Court for Prince George's County on two cases of assault with intent to murder and storehouse breaking on November 16, 1965, for which he was sentenced to twenty-four years imprisonment by Judge Robert B. Mathias and referred to Patuxent Institution for evaluation and determination as to his status as a defective delinquent. On June 25, 1968 Avey was released from Patuxent following an order of the Court of Special Appeals of Maryland which granted Avey a new trial. Following a subsequent conviction for the same crime and the same sentence, he was again transferred to Patuxent Institution on May 9, 1969. Avey was committed to Patuxent Institution as a defective delinquent on March 13, 1970 following a court trial in the Circuit Court for Prince George's County, Judge Samuel W. H. Meloy presiding.

Avey has an extensive record of past criminal activity beginning with breaking and entering for which he received twelve months imprisonment in Virginia on February 7, 1954; carnal knowledge in Baltimore, Maryland for which he received two years imprisonment on July 28, 1957; interstate transportation of a stolen motor vehicle and violation of the Selective Service Act for which he served two months in Richmond, Virginia, and he later served twenty months and two days in the Lewisburg, Pennsylvania Reformatory on the same offenses. He was later convicted of interstate transportation of a stolen

motor vehicle and received thirty months in the Lewisburg Penitentiary and thereafter was convicted on four counts of forgery for which he received six months imprisonment each, to run concurrently, in Manassas, Virginia. The latest conviction was the result of a storehouse breaking and subsequent gun battle with police.

Following his commitment, Avey's participation was good until June 24, 1971 when he escaped after earning a minimum security clearance. Avey was involved in a car explosion, spent his convelescence at the University of Maryland Hospital in Baltimore City and was again returned to Patuxent Institution on July 19, 1971.

The records of Patuxent Institution indicate that Avey is an unpredictable, explosive, destructive individual whose impulsive behavior shows no concern with the consequences to himself or others. He is emotionally flat and a person whose impulse controls are fragile and weak. These symptoms of emotional unbalance, coupled with his clear propensity toward antisocial activities, illustrate that Avey is a definite danger to society and a classic example of a defective delinquent (Res. Ex. 2—District Court).

Correction of Inaccuracies in Statement of Case of Brief for Petitioners

All counsel for Petitioners on remand from the Fourth Circuit to the District Court agreed that the original and redetermination proceedings as to all Petitioners met with the constitutional safeguards of due process. The District Court found that the last redetermination hearing of former Petitioner Tippett also met the constitutional standards of due process. *Sas, supra*, 295 F. Supp. at 395, 400.

In addition, Appellees (hereinafter collectively referred to as the "State") desire to correct certain inaccuracies in the Statement of Case in the Brief for Petitioners.

Testimony before the Circuit Court indicated that there was a distinction between a defective delinquent and recidivist criminal, and the same were marked by precise differences. Dr. Isadore Tuerk stated that "[I] would feel that the distinction would be that in a defective delinquent that there was through the individual's difficulties, a personality structure, an intellectual level, a behavior pattern characterized by danger to other individuals and property of a serious degree." (J. A. Md., 585) (J. A. 4, 182, 255, 470, 709).

The two pronged attack on the definition in Section 5 of the Act in the lower courts concerned the definition of the term "emotional unbalance" and a general allegation that the whole definition was too general. The testimony below by experts in the field of psychiatry and correctional reform indicate that the term "emotional unbalance" is susceptible of standard definition by practitioners in the field (J. A. Md., 162-163, 188, 272-274, 352, 403-404, 460, 464, 707). The thrust of this testimony was that the use of the term "emotional unbalance" when used in connection with the rest of the statute makes the same a readily understandable and definable term. Further, the testimony indicated that the whole definition set forth in precise non-technical terms, readily understood by the laity, a psychiatrically accepted and recognized mental or personality disorder which can be ascertained and diagnosed with a high degree of unanimity among experienced psychiatrists. (J. A. Md., 124, 161-162, 181-182, 188, 201-202, 238, 272-275, 283, 299-300, 325, 188-189, 662-663, 667, 683-684, 698-699, 712). (See also Exhibit No. 17, pages 14-16, Exhibit No. 54A, pages 8-12, Exhibit No. 54 B, page 21 — Circuit Court); *Director v. Daniels, supra,* at 56. Petitioners' reference to their expert's testimony indicates that not only did their expert have trouble with the definition

in Section 5 of the Act but also had trouble in interpreting the McNaughton Rule bearing on the issue of responsibility for criminal conduct (J. A. Md., 350). Although the experts in the Circuit Court testified that, with rare exceptions, those individuals adjudicated defective delinquents under the act would be drawn from a class designated by some psychiatrists as "sociopaths" or "psychopaths," the Maryland definition is in no way dependent for its validity on the use of such psychiatric terms, labels, or other naming devices (J. A. Md., 166, 169, 170-171, 203, 230, 238, 287-288, 388, 662) (J. A. 4, 278, 351-352).

In "Methods and Experience in Group Treatment of Defective Delinquents in Maryland," 1961, (J. A. 4, 503-505) the author discusses the use of group therapy as the treatment of choice at Patuxent. The testimony below by Dr. Manfred Guttmacher, Dr. Jerome B. Frank, Dr. Harold M. Boslow and Judge William S. Thomas, indicated that group therapy is the predominant modality at Patuxent since the Institution's experience shows that a defective delinquent does not relate well on a one-to-one relationship with a therapist and can derive more benefit from treatment in a group setting (J. A. Md., 774-775). See also (J. A. Md., 221, 385, 409, 631, 688, 774); *Director v. Daniels, supra,* at 61. Private psychiatrists are not allowed to treat at Patuxent Institution as they could not work within the framework of the Institutional program and such a practice would be open to abuse (J. A. Md., 556-557, 767). The testimony below further showed that there is no cataclysmic effect when doctors are required to testify against their patients at trial. Dr. Guttmacher felt that such testimony may have a positive effect on patients (J. A. Md., 240, 253, 317-318, 739).

Petitioners misconstrue Dr. Guttmacher's statement that an improper person as Director of Patuxent Institution

would result in a dangerous situation. What Dr. Guttmacher meant was that having an improper person as Director was possible. This, however, overlooks the obvious fact that the same situation pervades any establishment whether public or private. Dr. Guttmacher further pointed out that the courts act as an effective check on the power of the Director. Further, the Director is subject to the Board of Governors of Patuxent Institution, the Institutional Board of Review, whose responsibilities are delineated in Article 31B, Section 13 and the Secretary of Public Safety and Correctional Services who supervises Patuxent Institution pursuant to Article 41, Annotated Code of Maryland (J. A. Md., 257, 267, 775).

Although the custodial force at Patuxent Institution is drawn from a list of individuals submitted to all the correctional institutions in Maryland, the testimony below showed that the custodial staff at Patuxent Institution are given in-service training when they arrive at Patuxent Institution and that the Director continually makes every effort to see that more training is available (J. A. Md., 394, 772) (J. A. 4, 318-319).

Petitioners misconstrue the statement from the "Maryland Defective Delinquency Law," 1959 (J. A. 4, 501-503) when they indicate that a disproportionately large percentage of the criminal population may be referred to Patuxent Institution for examination. In actual practice, the persons responsible for referring individuals to Patuxent Institution for examination use their discretion and the institution has not been flooded with requests for examination (J. A. 4, 502).

Finally, Petitioners further misconstrue the article "The Maryland Defective Delinquency Law; An Eight Year Follow Up," 1963 (J. A. 4, 506-509). Dr. Boslow testified below that as Director he testifies in most of the original and

redetermination hearings which leaves the remainder of the staff free to treat (J. A. Md., 739). Citing from the "Report of the Committee of the American Psychiatric Association on the Patuxent Institution," 1960 (J. A. 4, 491-499), that it is bad medical practice for an evaluating doctor to testify against a patient the testimony below shows that having the treating doctor testify is not entirely a negative factor and that, as far as possible, the treating doctor does not testify (J. A. Md., 240, 252, 317-318, 739) (J. A. 4, 317); *Sas, supra*, 295 F. Supp. at 419. Further, the educational program at Patuxent Institution was adequately staffed and was not a trial period for a great social experiment (J. A. Md., 757) (J. A. 4, 324).

SUMMARY OF ARGUMENT

Article 31B was originally found facially constitutional by the United States Court of Appeals for the Fourth Circuit, but that Court remanded to the United States District Court for the District of Maryland for a determination of whether the definition was rendered unconstitutionally vague by the Court of Appeals of Maryland when that Court appeared to insert the term "psychopath" into the definition. Testimony before the Circuit Court for Prince George's County and findings by that Court and the Court of Appeals of Maryland were that the Court of Appeals did not incorporate the vague term "psychopath" into the definition and that the definition set forth in precise, non-technical terms, which were readily understood by the laity, a psychiatrically accepted mental or personality disorder which could be ascertained and diagnosed with a high degree of unanimity among psychiatrists, and a definition which could be easily applied in a jury trial.

Article 31B is civil in nature as found by the lower courts under the tests laid down by this Court in *Kennedy v. Mendoza-Martinez* and they further held that even if

not purely civil in nature, the Act did not deprive Petitioners of their rights against self-incrimination under the Fifth Amendment of the United States Constitution, nor did it deprive Petitioners of their right to confrontation under the Sixth Amendment of the United States Constitution in that Petitioners had adequate remedies by way of subpoena power and discovery procedures to enforce their rights of confrontation.

Article 31B does not deprive Petitioners of equal protection of the law under the Fourteenth Amendment of the United States Constitution in that the Legislature of Maryland has the right to define a class of individuals and segregate them in an institution where treatment would be provided to cure them and was so found by the lower courts. Treatment under the Act is required as found by the lower courts and all patients committed to Patuxent Institution have a right to and do receive treatment for their disorder.

The Eighth Amendment of the United States Constitution is not offended, as individuals referred to Patuxent Institution are not committed as defective delinquents solely on the basis of crimes against property without a finding of possible harm to other individuals in society as found by the District Court.

Petitioners are not denied due process of law when they are referred to Patuxent Institution for evaluation and determination as to their status as defective delinquents when the referral is made without a hearing or assistance of counsel. A referral to Patuxent Institution is made subsequent to a conviction for a crime and the imposition of an active criminal sentence as part of the dispositional process, and if the individual is found not to be a defective delinquent, he is returned to the Department of Correc-

tion to serve the balance of his criminal sentence. A hearing and assistance of counsel at this stage are not constitutionally mandated.

The process whereby Patuxent Institution collects information regarding an individual's past history and their personal examinations of individuals referred to Patuxent Institution are reliable fact-finding procedures, and the denial of counsel or an independent psychiatrist before a determination of defective delinquency is made by Patuxent Institution does not deprive Petitioners of due process of law.

Subsequent to commitment as a defective delinquent, Petitioners have adequate appellate remedies to challenge a finding of defective delinquency; the statutory procedure for redetermination hearings is reasonable to protect Petitioners' rights to review, along with the yearly evaluation by the Institutional Board of Review of Patuxent Institution; and the preservation of the writ of habeas corpus with which Petitioners may test the legality of their detention if they are not, in fact, receiving treatment.

Petitioners were not deprived of due process of law when the District Court refused to grant them the right to have an expert psychiatric witness testify when the testimony would be repetitive of the testimony heard in the Maryland courts and made a part of the record before the District Court. Petitioners were likewise not denied due process during the examinations at Patuxent Institution and the United States Court of Appeals for the Fourth Circuit found that a psychiatrist during examination was not constitutionally mandated.

The requirement that an individual be found to be a defective delinquent by a preponderance of the evidence does not violate the due process clause and is not constitutionally mandated as found by the Fourth Circuit.

Article 31B has been found by independent evaluation to provide effective treatment and to return those committed to Patuxent Institution to society free of their mental disorder and with the strong likelihood that more than two-thirds of those released from Patuxent Institution have been cured.

ARGUMENT

I.

THE DEFINITION OF DEFECTIVE DELINQUENT IS NOT UNCONSTITUTIONALLY VAGUE.

Petitioners' contention that the definition is vague rests primarily on the assumption that the Court of Appeals of Maryland incorporated the term "psychopath" into Article 31B, Section 5.

Article 31B, Section 5, defines a Defective Delinquent as ". . : an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment."

Testimony from the experts in the Circuit Court was unanimous in finding that the definition in Article 31B, Section 5, sets forth in precise, non-technical terms readily understood by the laity, a psychiatrically accepted mental or personality disorder which can be ascertained and diagnosed with a high degree of unanimity among experienced psychiatrists (J.A. Md., Guttmacher, 161-162, 181-182, 238; Menninger, 272-275, 283, 299-300; Roche, 188-189; Boslow, 662-663, 667; Judge Thomas, 683-684, 698-699.)

These same experts testified that, although with rare exceptions, those individuals adjudicated defective delinquents under the Act would be drawn from a class designated by some psychiatrists as "sociopaths" or "psychopaths", the Maryland definition is not dependent for its validity on the use of such psychiatric terms, labels or other naming devices (J.A. Md., Guttmacher, 166, 169, 170-171, 238; Menninger, 287-288; Roche, 203; Frank, 388, Boslow, 662). *Fleuti v. Rosenberg*, 302 F. 2d 652 (9th Cir., 1962) is not applicable to the Act where the definition is in no way dependent on the term "psychopath".

In *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940) the Appellant had filed for a Writ of Prohibition to prevent the Probate Judge from trying him as a "psychopathic personality" under Minnesota's Act. The Act had been defined to apply to persons who by an habitual course of conduct showed an utter lack of power to control their sexual impulses and hence were likely to attack others or otherwise inflict injury. This Court upheld the statute stating that there was a rational basis for the class selected by the legislature and that the definition was not so vague or indefinite as to constitute invalid legislation.

It was acknowledged by the Fourth Circuit in *Sas, supra*, 334 F. 2d that "[I]t is obvious that the Maryland statutory definition was carefully drawn to conform to the definition approved by the Court in the Minnesota case," referring to *Minnesota ex rel. Pearson v. Probate Court, supra*, where this Court upheld the constitutionality of the Minnesota Psychopathic Personality Act. 334 F. 2d at 514.

The Fourth Circuit also held in *Sas, supra*, 334 F. 2d that the Act was facially constitutional:

> "We hold that statute [Article 31B, Annotated Code of Maryland] to be facially constitutional; i.e., it is within the power of the state to segregate from among its lawbreakers a class or category which is dangerous to the public safety and to confine this group for the purpose of treatment or for the purpose of protecting the public from further depredations." *Sas, supra,* 334 F. 2d at 509.

The interest of the Fourth Circuit in the definition had arisen from its conclusion that the Court of Appeals of Maryland had construed the statutory definition to include a "psychopath", a term which is not susceptible of definition. Referring to *Palmer v. State,* 215 Md. 142, 137 A. 2d 119 (1957), the Circuit Court in its decision stated:

> "It seems clear to us that a reading of the *Palmer* case, in light of the testimony before us in this case, justifies the conclusion that the Court of Appeals was not in fact importing the term 'psychopath' into the statutory definition but that they were merely incidentally seeking another way of describing some emotionally unbalanced persons. In other words, its use in the opinion was merely an effort to seek a synonym for the term 'emotional unbalance' and not, in fact, a positive holding that the term 'psychopath', minus a description of what was meant by the use of that term, was being engraphed into and made a part of the definition. We believe, in view of the testimony, particularly of Drs. Menninger and Guttmacher, and the fact that the term is no longer and was not at the time of the *Palmer* opinion, a part of the nomenclature recommended by the American Psychiatric Association, that it is unfortunate that the term was used by the *Palmer* court . . . We conclude that in the light of the testimony in this case there is no need to give any further medical description to the non-medical term 'emotional unbalance' and that if the matter is squarely before the Court of Appeals that court will conclude that the term 'psychopath' is not a part of the definition, is not a

> synonym for emotional unbalance but that the term 'emotional unbalance' as used in the Act refers to a medically recognized psychiatrically disordered person who demonstrates 'persistent aggravated antisocial or criminal behavior', and who exhibits a type of psychiatric disorder manifested by deep-seated emotional conflicts which distort the individual's attitude towards society, and of society's attitude toward him resulting in an uncontrollable desire and the need to create continual hostile acts towards society and which is uncontrollable by the individual . . . With this description of the term 'psychopath' we feel the use of the term in the *Palmer* case does not destroy the validity of the statutory definition so as to cause it to become vague and meaningless, as was found to be a fact by the Ninth Federal Circuit Court of Appeals. In the statute involved in that case the term 'psychopath' was used without further amplification or definition, hence its use compelled the holding of insufficient clarity to meet constitutional requirements. *Fleuti v. Rosenberg*, 302 F. 2d 652 (1962)." *Director v. Daniels*, 243 Md. at 36-37.

In affirming the Circuit Court in *Director v. Daniels, supra*, the Court of Appeals of Maryland accepted the findings of the Circuit Court and effectively excluded from the definition any possible use of the term "psychopath". *Sas, supra*, 295 F. Supp. at 399. Examination of the working definition of Defective Delinquency dispels all doubts which were raised by the collateral "psychopath" question.

Petitioners state that under the Minnesota statute construed in *Minnesota ex rel. Pearson v. Probate Court, supra*, that the physicians were licensed; that standards of judging sexual psychopaths were different and the inmate could petition for release at any time. Under the Act, Article 31B, Section 2, the standards for the Director are sufficiently set out and the testimony before the lower courts was that proper psychiatrically trained physicians

were available at the Institution. The standards for judging defective delinquency are clearly set out in the Act and further, Article 31B, Section 10(c) saves the writ of habeas corpus for patients at Patuxent. Under the expanding concepts of the Eighth Amendment to the Constitution of the United States, the courts of the State of Maryland have been liberally construing the writ of habeas corpus and entertain all objections by those incarcerated in normal penal institutions and those committed to Patuxent Institution.

It is also stated by Petitioners at page 24 of their Brief that ". . . where doctors disagree (J.A. Md., 274) the law cannot delegate to them the delicate task of testifying to and of almost necessity determining the ultimate issue in a proceeding which leads to indeterminate confinement without maximum or minimum limits." This statement is contrary to the testimony in the Circuit Court and Petitioner's citation to the Joint Extract disproves this hypothesis. The reference to page 274 of the Joint Extract in the Court of Appeals of Maryland (J.A. Md., 274) contains testimony by Dr. Guttmacher that the definition is clear among experts in the field. See also *Director v. Daniels, supra*, 243 Md. at 53-54.

The Petitioners have quoted from an article by Thomas Sanford Bates regarding the definition of defective delinquent and intimate that the Director of Patuxent Institution disagreed with the definition and felt it was unworkable. The Director, when confronted with this quotation from the Bates article while testifying before the District Court, stated the following:

> "(The Witness) It is not true that I said that. I don't remember what he said. I am afraid he is not speaking for me. If I remember correctly, he asked me, whether New Jersey's definition was satisfactory. I said for

> New Jersey it is. He then asked me was I satisfied with the definition. I told him that no, I am not satisfied with the definition, but he forgot to say what was the most important part of the thing, that although I am not satisfied with the definition, I have not found anything that would replace it. It is the best available definition I have come up with yet . . . What Mr. Bates was, he just quoted part of what I said, and not the other part, not the important part." (J.A. Md., 738-739.)

Petitioner's other reference to the Bates article regarding "emotional unbalance" used to justify commitment of an individual for life is unrealistic. It pulls a single element from the definition to indicate that the whole is inflexible. Clearly, the testimony from the experts is that the definition, taken as a whole, is readily understood by psychiatrists and the laity and easily applicable in a jury trial.

The Brief of Petitioners further relies on a letter to J. V. Bennett from Mr. Bates to indicate that incarceration for intellectual deficiency or emotional unbalance alone is improper. This again is contrary to the record below. Dr. Peter Lejins, a leader in the field of correctional reform, testified before the Circuit Court regarding Mr. Bennett's statement as to "emotional unbalance" at page 41 of the Petitioner's Brief. He said that:

> "But I would say this much, that, for instance, using the words 'emotional imbalance', and I believe that second term in connection with emotional imbalance or immediately after emotional imbalance was 'mental deficiency,' or whatever term was used there, I think the terms are used here somewhat misleadingly, in saying that the staff of the Patuxent Institution on the basis of emotional imbalance suggests a life sentence. I do not agree with such a formulation because emotional imbalance could be injected into the definition, but it is only a part of the definition which appears,

I believe, in the Defective Delinquent Act, in paragraph 5, and when the emotional imbalance is read or seen within the context of that definition, it is not as vague a term as it appears when it is used in common parlance, and in general — emotional imbalance then begins something that leads to the proven dangerousness of the offender to the society, proven through several convictions and emotional imbalance means that. When you take emotional imbalance out of the context of this definition, and just simply say 'emotional imbalance' is the reason for the definition of the staff that this is a candidate for the Patuxent Institution you are actually beginning to use emotional imbalance in a different sense, in a popular sense . . . What I am trying to say is when you use emotional imbalance within the context of this definition, it means something specific, emotional unbalance which has been demonstrated as to endanger actual society. When you take the term out of the context and refer to emotional imbalance as a reason for a life sentence, then you are actually sort of misleading your listener in that sense. Secondly, I would say it is not a life sentence." (J.A. Md., 460-461.)

Further, Dr. Lejins, in discussing Mr. Bates' letter to Mr. Bennett stated the following:

"Now, to you as a sociologist or criminologist, are the terms 'intellectual deficiency' and 'emotional imbalance' foreign terms to your field?

Answer: No.

Question: They are not?

Answer: And I would say as a criminal lawyer or a professor of criminology, let's say, I am very familiar with these terms throughout the centuries of criminal jurisprudence, because the intellectual impairment or intellectual lack of maturity and emotional lack of balance and again maturity, have been always considered the elements in construing the concept of criminal responsibility, and I think from the legal

point of view, long before social science even emerged, these two concepts have been constantly used in construing the concepts of criminal responsibility." (J.A. Md., 463.) See also (J.A. Md., 162-163, 188, 272-274, 352, 403-404, 460, 464, 707).

Finally, Petitioner's contention is that the findings in the report to Governor Tawes dated December 17, 1964, by the Blue Ribbon Committee indicating that the administration of the Act had gotten out of hand at Patuxent, is not true. A reading of that report reveals to the contrary. (J.A. Md., 509-511.)

The definition of a defective delinquent is constitutional. *Sas, supra,* 295 F. Supp. at 399.

II.

THE PROCEDURES EMBODIED IN THE STATUTE AND IN TRIAL ARE NOT APPLIED IN SUCH A MANNER AS TO OFFEND THE DUE PROCESS REQUIREMENTS OF THE FIFTH AMENDMENT AND THE CONFRONTATION REQUIREMENTS OF THE SIXTH AMENDMENT.

Petitioners second argument rests primarily on the thesis that no treatment is available at Patuxent; that there is no preliminary determination to see if the individual would be aided by treatment; that the examination procedures violate the Fifth Amendment; that the confrontation requirements of the Sixth Amendment are not met at trial and other miscellaneous allegations.

A. The Procedural Safeguards Within the Civil Commitment Procedure.

The District Court found that whether the Act was characterized as civil or criminal, all due process requirements are amply protected. *Sas, supra,* 295 F. Supp. at 405. Further finding that the procedural requirements of the Act fully protect an individual referred to Patuxent Insti-

tution for evaluation, the Court reemphasized those requirements as found by the Circuit Court in *Director v. Daniels, supra:*

"The procedural requirements of the Act include these safeguards to the defendant:

1. He must be convicted and sentenced in a Maryland Court for a crime.

2. The crime must be of a particular category: (a) a felony or (b) a misdemeanor punishable by imprisonment in the penitentiary or (c) one of violence, or (d) a sex crime involving physical force, disparity of age, or of an uncontrolled or repetitive nature, or (e) two or more convictions for offenses punishable by imprisonment in a criminal court of this State.

3. There must be a request for examination by: (a) the Department of Correction, (b) the State's Attorney's office, (c) such person himself, (d) his attorney, or (e) the Court.

4. The Court must order the examination.

5. A copy of the order for examination must be served on the person to be examined.

6. The person must still be confined.

7. The examination must be made by at least three persons, one of whom must be (a) a medical physician, one a (b) psychiatrist and one a (c) psychologist.

8. A majority of the examiners must conclude that the person is a defective delinquent.

9. The person is entitled on request to be examined by a private psychiatrist of his own choice at the expense of the State unless he, himself, has asked for the original examination.

10. The person must, after the examination with an affirmative result, be brought before the Court and advised of the substance of the report and the pendency of the hearing.

11. He is entitled to counsel of his choice, or to competent counsel appointed by the Court.

12. Counsel has access to all records, reports and papers of the institution relating to the person and to all papers in the possession of the Court bearing on his case.

13. The person has a choice of a court or jury trial.

14. He may make application for leave to appeal from the order holding him to be a defective delinquent, although such appeal does not lie as a matter of right.

He, in addition to the specific statutory safeguards, has full opportunity to summon witnesses and to present evidence. Also, he has available to him all discovery procedure permitted under the Maryland Rules in civil cases, which is much broader than in criminal cases, including the taking of depositions, the use of interrogatories and demands for admission of facts.

'. . . An examination of the trial and hearing provisions of the Act can leave no doubt that it places around the accused more procedural safeguards than any of the Acts of a similar nature which have been upheld by the Courts against this attack.' *Sas v. Maryland, supra.* Also see *Minnesota, ex rel. Pearson v. Probate Court, supra* and *Buck v. Bell, supra.*" *Director v. Daniels, supra,* 243 Md. at 43-44.

Petitioners' contentions relate to whether the Act preserves those elements of due process which are necessary to uphold the constitutionality of Article 31B. In *Sas, supra,* 334 F. 2d the Fourth Circuit found that:

"The answer to all these objections is that with respect to state action, repeated decisions of the Supreme Court have put it beyond the range for further debate that the 'due process' clause of the fourteenth amendment has not the effect of imposing upon the state any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with." *Sas, supra,* 334 F. 2d at 515.

The court then proceeded to state that the Act provides adequate procedural safeguards not ordinarily found in other civil proceedings. *Sas, supra,* 334 F. 2d at 516.

Petitioners also question the categorization of the Act as civil with the concommitment elimination of conventional criminal procedural safeguards. Whether the Act is civil (regulatory) or criminal (penal) was originally characterized by the Fourth Circuit as a futile exercise in semantics. *Sas, supra,* 334 F. 2d at 516. But see *Tippett, supra,* 436 F. 2d at 1157. However, this court in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963), set forth seven tests to determine whether an act is civil or criminal. These tests were considered by the Circuit Court in *Director v. Daniels,* 243 Md. at 37-40, where that court found, under those tests, that the act was civil.

> "The Maryland Court of Appeals in *Eggleston v. State, supra,* decided the Act was regulatory in character and therefore not penal but civil in nature. It becomes vital that there be a proper determination as to the correctness of this conclusion because only if the statute is regulatory can the precise criminal procedures required to uphold the constitutionality of a penal statute be dispensed with. If, on the other hand, the act is regulatory and therefore civil in nature, the Fourteenth Amendment of the Constitution's requirement is met if there is provided reasonable safeguards under the circumstances which include consideration of the fact that persons may be deprived of their liberty for the good of society and themselves. It seems clear that if there exists affirmative evidence that the act results from a legislative intent to regulate rather than punish, the law is deemed to be civil in nature. *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 9 L. ed. 2d 644, 83 S. Ct. 554 (1963). We conclude from the evidence before us that the legislative history of the Defective Delinquent Act[4] clearly demonstrates that its sole objective

and purpose was not penal but an effort to segregate a known group of mentally disordered people who are found guilty of criminal acts, by confining them in an institution housing only members of their group in a sole effort to protect society and provide treatment to effect, if possible, a cure of the illness. From the history it is clear that the legislative imposition of sanctions by restraining the individual results from studies that indicate that such restraint is necessary both for the protection of society and to provide medical treatment to further curative measures. In short, it is the State's effort to determine the cause of a criminal's acts and if associated with mental disorder to accomplish improvement under psychiatric supervision so that he may hopefully be released, no longer a danger to himself or society. This act now before the Court is so similar in design and has a legislative purpose so similar to the act that was before the Supreme Court in *Minnesota, ex rel. Pearson v. Probate Court, supra,* that we believe the decision of that court upholding the constitutionality of the Minnesota Sexual Psychopath Law is direct authority for our conclusion that this act is civil in nature. We further point out that the purpose of this act is so closely akin to the so-called 'Sexual Psychopath' laws enforced in some twenty (20) states and the District of Columbia, that the decisions of the Courts in those jurisdictions that each of their laws is civil in nature is ample authority to conclude that the Maryland Act is regulatory. *State v. Madary,* 178 Neb. 383, 133 N.W. 2d 583 (1965); *People v. Levy,* 151 Cal. App. 2d 460, 311 P. 2d 897 (1957); *Miller v. Overholser,* 92 U.S. App. D. C. 110, 206 F. 2d 415 (1953); *In re Miller,* 98 N. H.-107, 95 A. 2d 116 (1953). See also cases cited in annotation under 'Sexual Psychopaths,' 24 A.L.R. 2d 350.

Assuming, however, that contrary to our finding here, there exists no conclusive evidence of legislative intent as to whether or not the act is penal or civil in nature, the answer to this question must be determined from the face of the Act after considering the following:

'. . . whether the sanction involves an affirmative disability or restraint; whether it has historically been regarded as a punishment; whether it comes into play only on a finding of scienter; whether its operation will promote the traditional aims of punishment, that is, retribution and deterrence; whether the behavior to which it applies is already a crime; whether an alternative purpose to which it may rationally be connected is assignable for it; and whether it appears excessive in relation to the alternative purpose assigned.' *Kennedy v. Mendoza-Martinez, supra.*

After considering these factors, we conclude that the statute on its face supports the conclusion that the act is civil in nature. We find this for the following reasons: Even though the sanction does involve an affirmative restraint it is provided only because it is deemed best for the protection of society and best for the protection and treatment of the individual that he be placed in a maximum security institution maintained solely for defective delinquents and not for other members of the criminal element. Historically, this type of sanction or restraint to accomplish the purposes of the Act has not been regarded as punishment but regulatory and is more akin to those laws consistently held to be civil in nature applicable to the 'sexual psychopaths.' Also this is true of laws involving loss of liberty by restraint of many mentally ill persons in mental hospitals in all of the states. The Maryland Act does not come into play on a finding of 'scienter,' because the person involved must before referral for diagnosis, already have been convicted of at least one criminal act and can be determined to be a 'defective delinquent' only after there has been an intensive mental examination. The law on its face clearly shows that it was not enacted to promote the aims of punishment, retribution and deterrence, but its only purpose is for the protection of society, and the treatment of the individual to effectuate a cure if at all possible. The Act clearly demonstrates that 'de-

fective delinquency' is not a crime but is a mental condition that can only be diagnosed and determined to exist after a finding of guilt. There exist alternate purposes which are valid functions of the State as a part of its police power. They are the protection of society, coupled with a humanitarian attempt to treat, cure and rehabilitate those suffering from abnormal mental functioning. The sanctions or incarceration provided by the Act are not excessive in relation to these alternative purposes since most reputable psychiatrists agree that treatment cannot be related to a fixed period of confinement, as the length of time necessary for treatment and cure, if it can be obtained, is uncertain. In addition, experience has demonstrated that the indeterminate confinement is itself therapeutic, as it has a tendency to generate and motivate the individual to participate in the institutional program in order to help himself.

Based on the testimony, we fear that without the indeterminate provision in the Act, violence would be done to its basic concepts and purposes, and much of the good sought by this legislation would go for naught. The very qualities making up the nature of an individual at Patuxent, with his warped attitudes and distorted outlook, would dictate to him that he antisocially wait out his allotted time, resisting introspection and any kind of reappraisal of his makeup, and refusing to cooperate in receiving available therapy to any degree that would give promise of his ultimate rehabilitation.

We find that on the basis of present psychiatric and psychological knowledge, it can be accurately predicted that certain individuals will commit crimes. In cases where it is believed that a person at Patuxent still maintains his propensity for crime, it would be a tragic destruction of the purposes of this legislation, a disservice to society and not the least of the errors, a serious injustice to the individual to release him, uncured.

> We therefore conclude that the Maryland Defective Delinquent Act is civil in nature under either test; that is, such a conclusion results from the legislative history and also the Act on its face supports this finding after taking into account the tests laid down by the Supreme Court in *Kennedy*."

Petitioners' reliance on *Specht v. Patterson*, 386 U.S. 605, (1967) is misplaced, as the statute involved did not provide for any notice or hearing as in *Minnesota ex rel. Pearson v. Probate Court, supra*, where there was an opportunity for hearing, representation by counsel and compulsion for production of witnesses.

Likewise, reliance on *Skinner v. Oklahoma*, 316 U.S. 535 (1942) is inapposite. There were no provisions for hearings in *Skinner, supra*, as there are under Article 31B. *Baxstrom v. Herold*, 383 U.S. 107 (1966), is distinguishable from the Act. *Baxstrom* involved a statutory procedure under which a person could be civilly committed following the expiration of a prison sentence without a jury review which was available to all others who were civilly committed. This decision is not directed at the Maryland Act, which provides all the protections which were absent in *Baxstrom*. *Holm v. Wyoming*, 404 P. 2d 704 (1965) is similarly inapplicable. That case held that the part of a Wyoming statute pertaining to mentally ill persons which provides that the court should not be bound at all by rules of evidence would totally abolish court procedures and was, therefore, void. The Circuit Court did not pass on the correctness of the Wyoming Court's decision but readily distinguished that case from ours for the reason that, contrary to the Wyoming law under attack, Article 31B does not abolish rules of evidence or court procedure but carefully preserved them.

B. The Applicability of the Self-Incrimination Clause of the Fifth Amendment.

Petitioners contend that patients at Patuxent Institution lose their Fifth Amendment privilege against self-incrimination during the examination procedures.

> "The proceeding is not accusatorial; it is not designed to elicit evidence or proof of guilt, for the patient has already been convicted. The purpose is to determine the appropriate type of punishment or treatment." *Sas, supra,* 295 F. Supp. at 409.

This contention was clearly answered by the Court of Special Appeals of Maryland in *Wise v. Director,* 1 Md. App. 418, 238 A. 2d 692 (1967), cert. denied *Wise v. Boslow,* 390 U.S. 1030, 88 S. Ct. 1420, 20 L. Ed. 2d 286 (1968), where that court held that the examinations did not constitute the type of in custody interrogation which was discussed in *Miranda v. Arizona,* 384 U.S. 436 (1966). The purpose of the examinations are ". . . not to determine or to gain evidence to prove that the subject has committed a crime, but rather to discover the inmate's mental and emotional condition. Defective delinquency proceedings are civil in nature, *Director v. Daniels;* 243 Md. 16 (1966) and as the applicant's statements did not subject him to criminal liability, there is no constitutional infirmity in the manner in which the examination at Patuxent was conducted. . . ." *Wise v. Director, supra,* at 422.

Further, the Fourth Circuit in *United States v. Albright,* 388 F. 2d 719 (4th Cir., 1968) also held that there was no constitutional right to have an attorney present during a psychiatric examination, stating:

> "It is difficult to imagine anything more stultifying to a psychiatrist, as dependent as he is upon the cooperation of his patient, than the presence of a lawyer objecting to the psychiatrist's questions and ad-

vising his client not to answer this question and that." *Tippett, supra,* 436 F. 2d at 1158.

The Fourth Circuit further held that counsel at the examination was not presently an absolute requirement of the due process clause. *Tippett, supra,* 436 F. 2d at 1158. The District Court also held that no constitutional right was violated. *Sas, supra,* 295 F. Supp. at 410.

Petitioners' right to remain silent is not infringed and the District Court found that no resort to punitive measures occurs when the patient refuses to submit to examination, and found no constitutional deprivation. *Sas, supra,* 295 F. Supp. at 410-411 (J.A. 4, 217-223).

The District Court held that the examination was " '. . . not to determine or to gain evidence to prove that the subject has committed a crime, but rather to discover the inmate's mental and emotional condition' " and that the right not to incriminate oneself is not violated *per se* by requiring him in an appropriate case to submit to a mental examination. *Sas, supra,* 295 F. Supp. at 411; *United States v. Albright, supra,* at 723-724.

> "This court accordingly holds that the examination procedures at Patuxent do not violate any right against self-incrimination. This Court entertains no doubt as to this conclusion; but were there any question it would not make the Maryland Act unconstitutional. An objection, if valid, could be made at the time of any later attempt to use such information in any proceeding to convict for crime." *Sas, supra,* 295 F. Supp. at 413.

The record clearly substantiates the fact that the Institution itself does not attempt to use any information gained from the patient in further criminal proceedings (J.A. 4, 204). Counsel for the State have found no case which indicates that any statements made during examination to

determine whether or not an individual is a defective delinquent were ever used in any criminal proceeding against the alleged defective delinquent and the State submits that the same would be inadmissible under *Miranda v. Arizona, supra.*

C. The Applicability of the Confrontation Clause of the Sixth Amendment.

The District Court stated that in strictly criminal cases confrontation was not always necessary where the accused had an opportunity to rebut findings and could have subpoenaed witnesses.[1] *Pointer v. Texas,* 380 U.S. 400, 407 (1965); *Gonzales v. United States,* 364 U.S. 59, 64, 66 (1960); *Sas, supra,* 295 F. Supp. at 407. The Court of Appeals of Maryland in *Brunson v. Director,* 239 Md. 128, 130, 210 A. 2d 372 (1965), held that there was no denial of the right of confrontation, especially where the patient had the right to subpoena witnesses. Although Petitioners contend this is an empty right, the fact remains that counsel for a patient has, prior to the defective delinquency hearing, access to all records from Patuxent Institution from which he may glean

[1] See note, "Confrontation and the Hearsay Rule," 75 Yale L.J. 1434: "Despite the superficial similarity between the evidentiary rule and the constitutional clause, the Court should not be eager to equate them. Present hearsay law does not merit a permanent niche in the Constitution; indeed, its ripeness for reform is a unifying theme of evidence literature. From Bentham to the authors of the Uniform Rules of Evidence, authorities have agreed that present hearsay law keeps reliable evidence from the courtroom. If Pointer has read into the Constitution a hearsay rule of unknown proportions, reformers must grapple not only with centuries of inertia but with a constitutional prohibition as well." Id., at 1436 (cited with approval in *Dutton v. Evans,* 400 U.S. 74, 87 (1971); see also *California v. Green,* 399 U.S. 149, 161 (1970), wherein this court referred to the need for the "trier of fact [to have] a *satisfactory* basis for evaluating the truth of the prior statement" (emphasis added). The type of hearsay evidence involved in the present case in no way differs from that which this court recently sanctioned in *Richardson v. Perales,* 402 U.S. 389 (1971).

the names of any person responsible for contributing to the Institution's reports. Counsel also has all the discovery procedures permitted under the Maryland Rules in civil cases with which to adequately enforce the right to confrontation. *Sas, supra,* 295 F. Supp. at 408; Maryland Rules of Procedure, Sections 400-425.

> "These statutory and judicially recognized safeguards fully protect the right, if any, of a party to a defective delinquency hearing to a confrontation of witnesses against him." *Sas, supra,* 295 F. Supp. at 408.

Petitioners quote from the "Maryland Defective Delinquency Law" (J.A. 4, 501) and omit the first part of the cited paragraph to establish that most of the facts leading the staff to make a determination are pure hearsay. The whole quote is as follows:

> "Clearly, this is not the intent of the law. If we had tests of emotional balance similar to tests of intelligence, where we could determine reasonable cutting scores below which an individual could be said to be sufficiently emotionally unbalanced to be considered a defective delinquent, our task would be considerably simplified. However, no such tests are available, although of course there are several which are of great value in estimating the extent of emotional unbalance in many cases. In the final analysis, we must rely quite heavily on case history criteria and on clinical impressions regarding the individual. Such impressions are not always as easily defended in court as objective, standardized measures and it is hoped that such measures will be derived in the future." (J.A. 4, 501-502.)

What the Director meant was that the objective tests which can effectively measure intelligence are not available for determining emotional unbalance; however, his reference to clinical impressions clearly means the per-

sonal interviews and personal testing performed by the staff during the evaluation. Further, this article, written in 1959, does not include the new testing procedures which the Institution has developed.

D. The Availability of Treatment at Patuxent.

That treatment is available to all patients at Patuxent Institution is beyond question and has been so found by the courts that have considered this question. *Director v. Daniels, supra,* 243 Md. at 60-61; *Sas, supra,* 295 F. Supp. at 416; *Tippett, supra,* at 416.

> "All patients are afforded an opportunity to receive such therapy, and non-participation is due either to recent commitment, improper attitude or outright refusal." *Director v. Daniels,* 243 Md. at 61.
>
> "Although Patuxent deals with the 'least promising' or 'most difficult kind of patient,' Patuxent has a favorable parole record, particularly in view of its strict parole provisions, and extended parole time." *Sas, supra,* 295 F. Supp. at 417 (Citations to footnotes omitted.)

Petitioners next contend that there is no preliminary hearing to decide whether an individual referred to Patuxent will be aided by or susceptible to treatment. Such a contention is contrary to the findings of the courts that all persons within the definition are treatable although not all are curable (J.A. 4, 313, 328, 342, 344). These findings that treatment exists and that all are susceptible to treatment renders this contention meaningless, especially in light of the history and purposes of the Act as reported in *Research Report No. 29, supra,* which stated that the purposes of Article 31B were to identify, remove from society and treat those found to be within the purview of the definition. A determination as to whether treatment would be effective would require the same type of examinations

as are currently being performed under Section (7) of the Act.

Although citing *McDonough v. Director*, 229 Md. 626, 183 A. 2d 368 (1962) for the proposition that treatment is available only when appropriate, the testimony before the District Court indicated that the Director and staff at Patuxent Institution recognize that confinement without treatment would be patently unconstitutional[2] (J.A. 4, 293.)

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[2] Amicus, the Prison Research Council at the University of Pennsylvania Law School, in its Brief, citing from *McCray, et al. v. State of Maryland* (Misc. Petition No. 4263, et al., Circuit Court for Montgomery and Howard Counties, November 11, 1971), now pending appeal before the Court of Appeals, cites that opinion as stating that there is ineffectual specialized treatment at Patuxent; that there are no written rules or regulations for inmate conduct, disciplinary procedures and other operating procedures and a description by one of the judges that there is no treatment.

What Amicus failed to state is that the court in *McCray, supra*, was concerned solely with disciplinary procedures and procedures used in the administrative segregation and punitive segregation areas of Patuxent Institution, and heard no testimony regarding the treatment program for those committed to Patuxent Institution. Specifically, the court found that the disciplinary procedures at Patuxent Institution did not conform to the evolving standards of due process which have recently been enunciated by the courts. Patuxent Institution was willing to and did change its rules and procedure in accordance with these evolving concepts.

The *McCray* court's comments regarding treatment went solely to treatment provided those in administrative segregation. Administrative segregation at Patuxent Institution is a confinement area for those who are a danger to the general population of the Institution or are in danger from those in the general population of the Institution. The court disregarded the purpose of administrative segregation and is requiring Patuxent Institution to alleviate by treatment those factors which place the individual in administrative segregation. The classic example of one in administrative segregation is a patient who commits acts of violence against another patient or has acts of violence committed upon him. There are few, if any, individuals in the administrative segregation unit for any other reason.

The gratuitous remarks by the court that Patuxent is "not a treatment center" (Amicus' Brief, p. 15) was again a comment made without basis in fact.

Amicus' reference to *Davis v. Director*, Misc. Petition No. 4410, Circuit Court for Montgomery County, December 10, 1971, is mis-

The State take exception to Petitioners' characterization of Patuxent as a *pure prison with no hope* at page 34 of their Brief. The record disproves this argument.

> "In its essence, the statute rejects the age old concept that every legally sane person possesses in equal degree the free will to choose between doing right and doing wrong. Instead, it substitutes the concept that there is a category of legally sane persons who by reason of a mental or emotional deficiency 'evidence a propensity toward criminal activity', which they are incapable of controlling. For those in the category who are treatable it would substitute psychiatric treatment for punishment in the conventional sense and would free them from confinement, not when they have 'paid their debt

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placed. *Davis* disregarded established Maryland law from *State v. Musgrove,* 241 Md. 521 (1966), which held that the Patuxent Institution was not required to make a finding of defective delinquency without the personal interview required by the Act. The record in this case amply supports the necessity of a personal examination before a professional diagnosis may be made by a psychiatrist, psychologist or medical doctor. The State filed a petition for the issuance of a Writ of Certiorari to the Court of Special Appeals of Maryland which denied the same on January 8, 1972 but included the following illuminating language:

> "It appearing that the order sought to be reviewed was entered in apparent disregard of the clear dictates of *State v. Musgrove,* 241 Md. 521; it further appearing, however, that the order sought to be reviewed was entered in a habeas corpus proceeding, and that this Court is without jurisdiction to review orders entered in such cases, either on direct appeal, *Hudson v. Superintendent,* 11 Md. App. 253, or on certiorari, Maryland Code, Article 5, Section 21, it is this 8th day of January, 1972, ordered by the Court of Special Appeals of Maryland, that the Petition for a Writ of Certiorari to the Circuit Court for Montgomery County in the above entitled case be, and it is hereby, denied for lack of jurisdiction."

Director v. Davis, Court of Special Appeals of Maryland, Misc. No. 23, September Term, 1971.

Subsequently, in *Strickland v. Director,* in the Baltimore City Court, No. 12537, opinion dated February 1, 1972, that court held on the same facts as *Davis v. Director, supra,* that *State v. Musgrove, supra,* must be followed and the Institution was not required to file its report without a personal interview.

> to society,' but when they have been sufficiently cured to make it reasonably safe to release them. With this humanitarian and progressive approach to the problem no person who has deplored the inadequacies of conventional penological practices can complain." *Sas, supra*, 334 F. 2d at 516.

The State further excepts to the statement at page 32 of Petitioners' Brief that "their counsellors are the agents of their accusers . . .". The record shows conclusively that the staff at Patuxent Institution, guided by professional standards of responsibility, works not for the sake of punishing but rather for the sake of treatment, rehabilitation, and eventual release to society. Patuxent works as will be shown in later arguments, and these contentions are utterly frivolous. *Sas, supra*, 295 F. Supp. at 420, Footnote 79.

E. Miscellaneous Contentions.

Petitioners' other contentions in this argument deserve some answer. Petitioners' statement that the patient is powerless against a "sea of incompetent, rambling and remote evidence" is totally devoid of merit. Patuxent Institution gathers its reports from other penal institutions, state and federal agencies as well as their own interviews and testing procedures. Petitioners would have this Court believe that such information is untrustworthy when in fact the same is derived from reputable sources. Further, patients are allowed to contradict any findings of the staff and efforts are made to obtain the true version of the same. Private investigators would, in this instance, be superfluous (J.A. 4, 203-218). Petitioners' statement that the opinion of the independent psychiatrist is a feed-back of the institutional determination is incorrect and reflects on the professional competence of the independent psychiatrists.

Petitioners' contention that the original and redetermination hearings constitute double jeopardy is without merit.

The District Court found that the hearings were ". . . not a retrial of the criminal conviction, or a trial 'for the same offense.'" *Sas, supra*, 295 F. Supp. at 413. The determination is purely dispositional and the District Court held that the same did not amount to double jeopardy. *Sas, supra*, 295 F. Supp. at 414; *Director v. Daniels, supra*, at 47.

III.

THE OBJECTIVES OF THE ACT ARE SUFFICIENTLY IMPLEMENTED TO SUPPORT ITS CHARACTERIZATION AS A CIVIL PROCEDURE TO SATISFY CONSTITUTIONAL SAFEGUARDS AND PATUXENT INSTITUTION DOES PROVIDE ACTUAL TREATMENT TO DISTINGUISH IT FROM CONVENTIONAL PENAL INSTITUTIONS SO AS TO SATISFY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioners' first contention in Argument III of their Brief is that the objectives of the Act are not sufficiently implemented to characterize it as a civil procedure. This question has been fully answered in the State's Argument II.[8]

Petitioners' second contention in their Argument III relates to the elimination of other criminal safeguards. Their third contention that there is little actual treatment at Patuxent Institution was argued by Petitioners in their Arguments III and V. The State has therefore combined Petitioners' Arguments III and V in this Argument.

Miscellaneous Criminal Safeguards

The findings of the courts in *Director v. Daniels, supra; Sas, supra*, 295 F. Supp., and *Tippett, supra*, that the act is civil and the findings in *Sas, supra*, 295 F. Supp., that even

[8] Petitioners' discussion in this argument relating to the vagueness of the term "emotional unbalance" has been fully answered in the State's argument I.

if not purely civil, all procedural due process requirements are met, belies Petitioners' contention that patients at Patuxent Institution lose conventional criminal safeguards. Petitioners' reference to confrontation is discussed in State's Arguments II and IX. The right to trial by jury and to have the jury pass on the law as well as the facts is a right guaranteed under the Maryland Constitution in criminal cases only and is not a requisite in the post-adjudicatory stage of proceedings contemplated under Article 31B. Petitioners' right to bail is necessarily limited but does not raise itself to the status of a constitutional guarantee.

Petitioners' citations to *Cross v. Harris*, 418 F. 2d 1095 (D.C. Cir., 1969), and *Bolton v. Harris*, 395 F. 2d 642 (D.C. Cir., 1968) involve interpretations of the District of Columbia Sexual Psychopath Act. In *Cross, supra*, 418 F. 2d at 1102, the quotation referred to by Petitioners in their brief discusses the procedural requirements necessary for commitment under that Act. That court's citation to *Specht v. Patterson, supra*, and *Minnesota ex rel. Pearson v. Probate Court, supra*, in footnote 45, 418 F. 2d at 1102, indicates those procedural aspects which the District of Columbia Court of Appeals felt were necessary to uphold that Act. The findings below indicate that Article 31B fully meets these due process requirements.

Petitioners' rights to a speedy trial, while normally not attaching in a civil proceeding, can be tested by the writ of habeas corpus which is specifically reserved to petitioners under Article 31B to test the legality of detention if they have not, in fact, had a hearing on the issue of defective delinquency prior to the expiration of their original criminal sentence. Petitioners further state that the writ of habeas corpus is unavailable to one found to be a defective delinquent and that he must rely on the statutory provision for a redetermination hearing to which he is en-

titled under Article 31B, Section 10. The speedy "trial" problems found differ in no material respect from those found unsubstantial by this Court in *United States v. Marion*, ... U.S. ....., 30 L. Ed. 2d 468, 92 S. Ct. ..... (1971). Further, one may test, by the writ of habeas corpus, his commitment if he is not, in fact, receiving treatment.

TREATMENT

In *Director v. Daniels*, 243 Md. at 38, the Court of Appeals of Maryland noted the nonpenal purpose[4] and hopes behind Article 31B:

> "We conclude from the evidence before us that the legislative history of the Defective Delinquent Act clearly demonstrates that its sole objective and purpose was not penal but an effort to segregate a known group of mentally disordered people who are found guilty of criminal acts, by confining them in an institution housing only members of their group in a sole effort to protect society and provide treatment to effect, if possible, a cure of the illness. From the history it is clear that the legislative imposition of sanctions by restraining the individual results from studies that indicate that such restraint is necessary both for the protection of society and to provide medical treatment to further curative measures. In short, it is the State's effort to determine the cause of a criminal's acts and if associated with mental disorder to accomplish improvement under psychiatric supervision so that he may hopefully be released, no longer a danger to himself or society."

[4] Petitioners' recurring theme that court testimony is a major and time consuming part of the institution's activities again overlooks the fact that the Director testifies in the great majority of cases which frees the remainder of the staff to treat (J.A. Md. 739), *Sas, supra*, 295 F. Supp. at 419. The implication that treatment and rehabilitation are not a major and time consuming part of the institution's activities is contrary to the findings of the courts below.

The reformatory does not reform; the house of corrections does not correct; and the penitentiary does not make one penitent.

> "In primitive times, each individual dealt with wrongs done him as he saw fit. In taking personal revenge the retaliation, being unrestrained, frequently went far beyond the original wrong . . . As time passed, the practice of individual retaliation for wrong suffered was no longer sanctioned . . . Punishment was still meted out on the basis of retribution, but it was inflicted by the state, not by the individual wronged, and within a framework of law, not under the vague sanction of ancient traditions and customs." *Manual of Correctional Standards*, The American Correctional Association, 1969 Edition.

The only forward step in penology since the American Revolution has been that of "rehabilitation". Whenever a new concept of rehabilitation is expounded, the exponent really means that more time and more money will hopefully be spent in educational and vocational rehabilitation, that is, imparting language and manual skills to one convicted of a crime and sentenced to a penal institution.

> "In its essence, the statute [Article 31B] rejects the age-old concept that every legally sane person possesses in equal degree the free will to choose between doing right and doing wrong . . . it would substitute psychiatric treatment for punishment in the conventional sense and would free them from confinement, not when they have 'paid their debt to society', but when they have been sufficiently cured to make it reasonably safe to release them. With this humanitarian and progressive approach to the problem no person who has deplored the inadequacies of convention penological practices can complain." *Sas, supra*, 334 F. 2d at 516.

Petitioners' contention that there is no bona fide effort at treatment at Patuxent because George Creswell was

seen by a psychiatrist on only a few occasions does not mean that there is no treatment at Patuxent Institution.[5] Most of the personal interviews with the psychiatrist were purely for the purpose of evaluation. This completely overlooks the group therapy aspect of Patuxent Institution and the record below, which indicates that group therapy is the treatment of choice at Patuxent, and individual therapy is used only as a supportive device (J.A. 4, 255). As previously stated, treatment is required at Patuxent Institution (J.A. 4, 293).

The concern voiced by Petitioners that patients at Patuxent cooperate or sit is a broad oversimplification. The record below clearly illustrates that for therapy to be beneficial to one committed to Patuxent Institution, the patient must endeavor to help himself. The psychiatric testimony indicates that therapy is difficult when any patient does not actively seek help from his therapist. The findings of the courts below that the procedures at Patuxent are constitutional renders this contention untenable. The contention that a patient must rely on State psychiatric help on a take it or leave it basis is frivolous when practical considerations shown in the record are considered. Few, if any, patients could afford their own psychiatrists, and few, if any, patients could receive better help elsewhere. The District Court considered and fully explained that a private psychiatrist could not properly share and participate in the Institution's program. *Sas, supra*, 295 F. Supp. 419-420.

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[5] As this Court commented in *McKeiver v. Pennsylvania*, ___ U.S. ___, 29 L. Ed. 2d 647, 654 (1971) after noting the "alarm over its defects", stated that its decisions "do not spell the doom of the juvenile court system or even deprive it of its informality, flexibility or speed". The State respectfully submits that occasional examples of neglect, although not as to this Petitioner, though deplorable, are not signs of a constitutionally defective structure.

Petitioners' statement that property crimes only would subject one to Patuxent Institution is answered in State's Argument IV. They request a delineation be made and the same has been made. *Sas, supra*, 295 F. Supp. 414-415.

Article 31B ". . . represents an enlightened and progressive experiment aimed at rehabilitating persons . . ." *Tippett, supra*, at 1157. Article 31B is no longer an experiment but a proven concept, staffed and run by dedicated experienced men who direct their full attentions to curing those individuals who medical science felt could never be helped (J.A. Md., 288-289, 295).

The statement that one-third of the patients were not receiving active treatment or therapy is incorrect. *Director v. Daniels, supra*, at 61. Further, those transferred by the Department of Correction to Patuxent were transferred for purposes of security only during an emergency (J.A. 4, 326 and 363). The intimation that Patuxent stops receiving referrals is incorrect. This occurred once, was directed to the Department of Corrections, also as an emergency measure, and the emergency ceased to exist shortly thereafter (J.A. 4, 355-356). Finally, group therapy is the treatment of choice at Patuxent Institution because it has been found the best method of treating defective delinquents (J.A. Md., 221, 385, 409, 631, 688, 774). See also *Director v. Daniels, supra*, at page 61.

Petitioners further misconstrue the success rate stated at trial by the Commissioner of Corrections. His statement was that one out of four people returned to the institutions, but of those serving sentences 70 to 75 percent have been locked up before (J.A. Md., 521). Petitioners overlook the fact that Patuxent Institution deals with ". . . the 'least

promising' or 'most difficult kind of patient . . .'" *Sas, supra*, 295 F. Supp. at 417.[6]

> ". . . [S]ince the effectiveness of the law [Article 31B] has now been demonstrated, I predict that most states will enact a similar statute within the next five to eight years. I further predict that 20 years hence psychiatric historians will regard this statute as one of the major accomplishments of the middle third of the 20th century." Hodges, Emory F., "Crime Prevention By The Indeterminate Sentence Law" *American Journal of Psychiatry*, 128:3, September 7, 1971 at 294.

Factual studies support this conclusion:

> "The findings show that of a total of 807 men diagnosed as defective delinquents on first admission, 263 committed post release offenses; 95 of these recidivists came from the untreated group, 111 from the partially treated group, and 57 from the fully treated group.
>
> Let us now ask how many recidivists there would have been in the same group of men if there had been no law on defective delinquents in Maryland. The fact is that 81 percent of the group adjudicated as 'not defective delinquents' did become recidivists. It seems reasonable to assume that the group committed by the courts as defective delinquents would have produced at least as high a percentage of recidivists as the group that was not committed. Without the statute, the 807 men diagnosed as defective delinquents would have served fixed sentences in the Department of Corrections. An 81 percent recidivists rate in this group would have produced 654 recidivists.
>
> The difference between the 654 recidivists expected without this law and the 263 actual recidivists is 391; this represents the approximate number of recidivists

[6] Petitioners' reference to the testimony of Vernon Pepersack that 70 to 75 percent of the individuals in the correctional system are sociopaths is incorrect. What Mr. Pepersack did say was that 70 to 75 percent of those individuals were repeaters, not sociopaths, sociopath being a term that is not equated with the definition in Article 31B. (J.A. Md., 521).

the law may be said to have prevented through June 1966. Now, nearly five years later, I estimate the number of recidivists that the law has prevented to be well over 500. .

Since the data show that the average recidivist has been convicted of several post release offenses, the number of crimes that have been definitely prevented in this group was estimated at over 1000 through June 1966.

By now this figure could easily have reached 1,500. Recalling that there are on the average several unsolved offenses for every conviction, the volume of prevented crimes would seem to be even higher. The effect of the law is of course cumulative, and each year adds a large increment to the volume of crimes that this law is preventing. FBI data on mobility of felony offenders strongly suggests that well over half of these prevented crimes would have occurred outside of Maryland. Thus the benefits of this law have accrued to many states." (Footnote omitted.) *Hodges, supra*, at 294.

Petitioners again intimate that there is no therapy at Patuxent because there is no time and no staff. This again overlooks the findings of the courts that treatment is available to all patients at Patuxent; that there are no deficiencies in staff; and, the most important factor, that Patuxent works. *Director v. Daniels, supra*, 243 Md. at 60-61; *Sas, supra*, 295 F. Supp. at 415-417.

"The interests of society and of the prison population demand the sort of innovative reappraisal of our correctional institutions, their practices and procedures, for which the Chief Justice has plead. At the very least, Patuxent is an encouraging example of one kind of approach to a solution of these difficult problems. *Time is required to appraise its ultimate effectiveness*, but there is firm foundation for hope that it will prove a material and positive step toward

> the rehabilitation of mental and emotional defectives, and the protection of society from those antisocial defectives who are beyond rehabilitation." *Tippett, supra*, 436 F. 2d at 1158. (Emphasis supplied.)

Dr. Emory F. Hodges, in his article "Crime Prevention by the Indeterminate Sentence Law" [Reprinted in full as Appendix B to the State's Brief] performed the previously quoted follow-up study of individuals released from Patuxent Institution. Dr. Hodges found, using the Federal Bureau of Investigation's Studies on Careers in Crime, that over 91 percent of serious criminal recidivists commit their violations within the first three years after release. Using as a cutoff date the year 1966, Dr. Hodges studied three groups of individuals released from Patuxent Institution. The first group were those found by the Institution to be defective delinquents but not committed; the second group were those who were committed to Patuxent Institution but not released by the Institutional Board of Review; and the third group were those paroled by the Institutional Board of Review. His figures indicate that

> ". . . [O]mitting the uncertain cases in which persons were charged with an offense but the disposition was unknown, we find that recidivism occurred in 81 percent of the untreated group, 71 percent of the partially treated group, and in only 37 percent of the fully treated group . . . The current finding that 37 percent of 156 parolees had new offenses suggests that Patuxent staff is maintaining rather consistent criteria for granting parole. These recidivist rates, as Boslow has observed:
>
> > '. . . deviate *significantly* from the anticipated national recidivism rate, which is usually quoted as between 65 percent and 70 percent. However, there is no other institution in this country comparable to Patuxent with its indeterminate parole system. When one considers the severe beha-

> viour disorders that are found in our particular population, the fact that, by definition, our population is composed of recidivists whose prognosis for successful rehabilitation would be quite guarded, these figures become even more impressive.' (Emphasis added.)
>
> It should be noted also that 80 percent of the 210 felony recidivists were released through court initiative, compared to 20 percent released on parole by the Patuxent staff. It would seem that if the judges and juries had accepted the recommendations of the staff more often, the number of recidivists would have been smaller." *Hodges, supra,* at 293-294.

Not only do these statistics indicate that Patuxent works but it further indicates that Patuxent has achieved one of its primary purposes, that of identifying those individuals who are likely to commit another crime. Hodges' findings that 81 percent of the untreated group and 71 percent of the partially treated group did, in fact, commit a new crime indicates that the criteria used by Patuxent Institution are valid.

The insistent complaint that treatment is not required under the Act or under its various interpretations overlooks the testimony before the District Court that incarceration without treatment would be unconstitutional. (J.A. 4, 293.)

The entire thread of argument throughout Petitioners' Brief is that no one cares and that no one does anything for those committed to Patuxent Institution. Petitioners dwell on the fact that incarceration will be for life. The record reflects that people do care and things are done for those committed to Patuxent Institution. Patuxent Institution is not a life sentence behind bars, but rather the only hope that Petitioners have for life in free society.

IV.

THE EIGHTH AMENDMENT PROVISION AGAINST CRUEL AND UNUSUAL PUNISHMENT IS NOT OFFENDED WHEN THE STATUTORY REQUIREMENT THAT A DEFECTIVE DELINQUENT BE AN "ACTUAL DANGER TO SOCIETY" IS BEING APPLIED TO OFFENSES AGAINST "PROPERTY" AS WELL AS VIOLENCE AGAINST PERSONS.

The apparent thrust of this contention is that there exists a well-defined group of persons, including Petitioner Murel, who were committed to Patuxent only because of "underlying criminal involvement . . . directly and solely related to property" and that this treatment at Patuxent of "non-violent" "property" offenders does not comply with this Court's teaching in *Robinson v. California*, 370 U.S. 660 (1962).

Article 31B, Section 5 requires that the individual clearly demonstrates an actual danger to society.

Petitioners' argument is based upon the untenable premise that one who commits a crime against "property" cannot, by that criminal activity or by the totality of his conduct, be considered "an actual danger to society."

Dr. Karl A. Menninger indicated that it was not possible to split hairs about what is dangerous:

> "If you break one law, if you have nerved yourself up to defy social regulations and defy the order and break one law, a sudden shift in the situation is very likely to precipitate the breaking of another law.
>
> As you very well know, in many — how many men I see and examine and sometimes treat, how many of them have said, 'if she had not screamed I wouldn't have done it'? Many prisoners start out with the idea of taking something, they are detected, they panic and then a subsequent act occurs which is very dangerous. So that if you could just do it in a classroom or academically you could say damage to property is really not a danger. I don't know whether that could

be argued because, after all — I have to think a little bit about the construction of the word danger there but certainly the possibility of the impulse to shortcut social prescription does not stop to make these fine distinctions — does not always stop to make these fine distinctions in times of crisis. It is awfully hard to say no person has ever been injured, therefore this fellow is not dangerous because . . .

. . . But a hundred break-and-enters, a man who had done a hundred or ten break-and-enters I would say it does make him dangerous because there is a kind of motor activity, there is a kind of — there is a nice scientific word, I wish I could ask one of my colleagues for it — at any rate, this motor expression that is involved in burglary and things of that kind makes even property damage a more dangerous kind of possibility for the individual himself." (J.A. Md., 323-324) (J.A. Md., 175-176, 323-325, 542, 665).

This practical psychiatric observation is augmented by prior judicial considerations of the same difficulty in drawing a distinction so as to exclude a given offense, under all circumstances, from being considered manifestation of an "actual danger to society." In *Director v. Daniels, supra*, 243 Md. at 48, 49, the Court of Appeals of Maryland observed that:

> "When this mental illness [defective delinquency] exists it is no less real because *an* outward manifestation has been an offense against property than an offense against a person." (Emphasis supplied.)

For instance, in *Cowman v. State*, 220 Md. 207, 151 A. 2d 903 (1959), one outward manifestation of "actual danger" was burglary against his employer's warehouse and safe, but other manifestations were drug or alcoholic-induced seizures and a psychiatric finding of general anger to the world. In *Palmer v. State, supra*, although one manifesta-

tion of actual danger was housebreaking, other manifestations included escape, burglary, auto theft, and an expert conclusion that he is a social menace and will be a threat to society until he commits a crime of sufficient magnitude such as murder, robbery or a sex crime, the basis of this opinion being extensively detailed. In Petitioner Murel's case, there were juvenile adjudications and adult convictions as to his attempted burglary, assault, breaking and entering, disorderly conduct, and burglary. In view of the totality of his record (Respondent's Ex. 4, District Court), the State finds highly questionable this Petitioner's allegation that his crimes relate solely to property. Common law burglary, statutory burglary, and breaking and entering in its various forms in Maryland require, as major elements, that the individual has broken and entered a dwelling house, storehouse, or other building with the intention to commit a felony therein, to wit murder, rape, etc. and/or steal monies, etc. The State is at a loss to concede that these crimes are pure property crimes involving no danger to any individual within the dwelling or who enters the dwelling subsequent to the breaking and entering. The State contends that even were the Act construed to relate to property offenses only, that the same would not be cruel and unusual punishment. *Oyler v. Boles*, 368 U.S. 448 (1962). Petitioner's citation to *Robinson v. California, supra*, does not compel the conclusion that the Act must clearly read to include those who have committed crimes against property especially in light of *McDonald v. Director*, 236 Md. 642, 204 A. 2d 563 (1964).

In *Cowman, supra*, at 212, the Court of Appeals of Maryland recognized that:

> "It may well be that there are some crimes, or series of crimes, so trivial as to pose no actual danger to society. Repeated incarcerations for being drunk and

> disorderly, for example, might threaten no actual danger to the person or property of others, but rather to the individual himself."

Where no actual danger to persons exist, the individual would not come within the definition of Article 31B, Section 5. *Cowman, supra,* at 212.

In *Sas,* the Fourth Circuit specifically requested the trial court to determine ". . .. whether the interpretation and application of the statutory requirement that a defective delinquent be found to be 'an actual danger to society' may within the eighth amendment's prohibition against cruel and unusual punishment include those whose conduct indicates no more than a danger to property rights as distinguished from violence to the person . . ." *Sas, supra,* 334 F. 2d at 509. The District Court found that ". . . the uncontradicted testimony, both before the Circuit Court and in this Court establishes that in fact Patuxent recommends commitment as a defective delinquent only in cases where the inmate is considered to be dangerous to the person. This Court therefore finds as a fact that the 'interpretation and application' of the Maryland Acts do not 'include those whose conduct indicates no more than a danger to property . . .'" *Sas, supra,* 295 F. Supp. at 415, (J.A. Md., 666, 784), (J.A. 4, 353). *Robinson v. California, supra,* at 667, held that the status of being a narcotic addict could not be punished because:

> ". . . [T]he State recognized that narcotic addiction is an illness. Indeed, it is apparently an illness which may be contracted innocently or involuntarily. We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug . . . or been guilty of *any irregular behavior* there, inflicts a cruel and unusual punishment . . ."

In attempting to treat the illness of defective delinquency,[7] the State of Maryland has a standard infinitely more stringent than "irregular behavior." Petitioner Murel and others would be hard pressed to show that their conduct is so "regular" as to be outside the State of Maryland's legitimate interests in correcting it. Such an assertion was advanced and repudiated in *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905), wherein it was said:

> " 'Whatever may be thought of the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution. Nor, in view of the methods employed to stamp out the disease of smallpox, *can anyone confidently assert that the means prescribed by the State to that end has no real or substantial relation to the protection of the public health and the public safety.*' " (Emphasis by the Court.)

V.

PETITIONERS WERE NOT DEPRIVED OF DUE PROCESS AND EQUAL PROTECTION WHEN THEY WERE DENIED LEAVE TO EMPLOY INDEPENDENT PSYCHIATRIC EXPERTS AT THE GOVERNMENT'S EXPENSE BEFORE THE DISTRICT COURT, NOR WERE THEY DENIED DUE PROCESS OR EQUAL PROTECTION WHEN THEY WERE DENIED AN INDEPENDENT PSYCHIATRIST PRIOR TO A FINDING OF DEFECTIVE DELINQUENCY BY PATUXENT INSTITUTION.

The claim of constitutional deprivation in this argument is based upon (A) the absence of an "independent" psychiatrist at trial before the District Court and (B) the ab-

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[7] Statutory schemes and judicial sentences thereunder with far less foresight or soul-searching and with purely penal motives have been held by this Court to be non-violative of the "cruel and unusual" punishment provision. *See Graham v. West Virginia*, 224 U.S. 616 (1912). *See also Buck v. Bell*, 274 U.S. 200 (1924), not directly involving that provision. In *Trop v. Dulles*, 356 U.S. 86 (1958), this Court noted that this clause is to be simply examined in the light of the basic prohibition against inhuman treatment without regard to the subtleties of the meaning that might be latent in the word "unusual."

sence of an "independent" psychiatrist during evaluation at Patuxent Institution.

A. Absence of an "Independent" Psychiatrist before the District Court.

Petitioners' motion for leave to employ an independent psychiatric witness at the expense of the United States was filed on July 5, 1967 and a hearing was held on this issue before the District Court on July 28, 1967. The ostensive reason for independent psychiatric experts was to rehash the testimony proffered by the psychiatric experts called by the Circuit Court, by Petitioners and by Respondents in the proceedings in the Circuit Court for Prince George's County. Further, the District Court offered the following reasons for denying psychiatric expert testimony at the expense of the United States:

> "(The Court) We have several motions; the first one is a motion that the Court authorize Mr. Feissner, and presumably the same privilege would be granted to the others, to authorize him to employ independent psychiatric witnesses on behalf of the petitioners in the consolidated Sas cases.
>
> Reference is made to title 18, Section 3006(a). Whatever the status of these cases may be in the State Courts, that is, whether they are criminal or civil, there can be no question, in this Court, they are under the Civil Action procedure, and title 18, Section 3006(a) is just inapplicable.
>
> We can't even use it to pay counsel in habeas corpus cases, the ordinary ones, or to pay counsel for the time spent in representing defendants in probation revocation hearings. It definitely refers to strictly criminal proceedings.
>
> Now, in my volunteered capacity, I believe, in the past, the State has seen fit to make such assistance available in monetary form. These are, obviously, important cases, and if the State is able to make available

funds for counsel on my right to employ independent psychiatric witnesses, it would be a gracious and perhaps wise, gesture, but I can only make a suggestion, and, obviously, cannot require it.

I think it is a matter as to which an answer should promptly be given."

(Excerpt from Transcript of Proceedings before the Honorable R. Dorsey Watkins, United States District Judge, on July 28, 1967 in Civil No. 14197.)

Petitioners' first contention, that they were denied due process and equal protection when the District Court refused to appoint independent psychiatric experts for the hearing, was not raised on appeal to the Fourth Circuit and need not be considered by this Court. See *Neely v. Martin Keby Construction*, 386 U.S. 317 (1967), rehearing denied 386 U.S. 1027.

Even if the issue were appropriately preserved for review, Respondents would argue that this situation is controlled by *Britt v. North Carolina*, ... U.S. ....., 30 L. Ed. 2d 400 (1971), for similar to the *Britt* situation, the Petitioners had an informal alternative in the form of access to the Patuxent staff records and rebuttal of allegedly "incompetent" information thereunder. This informal alternative need not be perfect; it need only be meaningful.

Such testimony as proffered by Petitioners was to repeat the psychiatric testimony previously given in detail in the Circuit Court and, as the same was duplicitous, the State was unable to authorize the expenditure of funds for the same.[8]

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[8] Included among the Court's witnesses in the Circuit Court were Dr. Manfred Guttmacher, Dr. Philip Q. Roche, Dr. Karl A. Menninger, Dr. Isadore Tuerk, Dr. Harold M. Boslow. Witnesses called by the parties were Dr. Anna Marie Rosenberg, Dr. Jerome D. Frank, Dr. Ralph Meng, Dr. Edward Schnoor and Dr. Brian Crowley. Their qualifications are set out in *Director v. Daniels, supra*, 243 Md. at 66-68 (J.A. Md., 45-48).

B. Absence of "Independent" Psychiatrist During Evaluation at Patuxent Institution.

Petitioners' second contention concerns appointment of an independent psychiatrist at the expense of the State prior to a determination by Patuxent Institution that an individual is a defective delinquent. This question was first presented in Petitioners' Brief to the Fourth Circuit and therefore is not properly before this Court. In any event, the contention in itself is unmeritorious. If one referred to Patuxent Institution is recommended for commitment as a defective delinquent, Article 31B, Section 7(d) provides that he shall in each and every case be afforded the services of an independent psychiatrist for the purposes of furnishing testimony in his behalf at the actual hearing on defective delinquency. There is no sound reason for a psychiatric witness to be available to combat or prevent a possible finding of defective delinquency and the same would be an unconscionable waste of funds as the individual may be found not to be a defective delinquent. It is only a point in time that is contested by Petitioners. At most, it is pointed out in the opinion of the Fourth Circuit affirming the District Court that to permit an independent psychiatrist to participate in the proceedings at this early stage might prove fruitful but the failure to do so does not amount to a constitutional infirmity. *Tippett, supra,* at 1157. *Timmons v. Peyton,* 360 F. 2d 327 (4th Cir., 1966), cited by Petitioners, dealt with the question of counsel at early stages of a criminal prosecution and not with the availability of an independent psychiatrist concurrently with an evaluation by the State of competency to stand trial and competency at the time of the commission of the crime. Further, *Timmons, supra,* dealt with procedural requirements at the adjudicatory stage and not at the post-adjudicatory or dispositional process.

VI.

THE PETITIONERS WERE NOT DENIED DUE PROCESS OF LAW BY REFERRAL TO PATUXENT INSTITUTION FOR EXAMINATION AND DETERMINATION AS TO THEIR STATUS AS DEFECTIVE DELINQUENTS WITHOUT NOTICE, HEARING OR ASSISTANCE OF COUNSEL.

Petitioners, after eight years of litigation, raise for the first time in this Court the question of referral to Patuxent Institution for examination and evaluation as to their status as Defective Delinquents without notice, hearing or assistance of counsel.

Following conviction of an enumerated crime under Article 31B, Section 6(a) and the imposition of an active prison sentence, an individual may be referred to Patuxent Institution for examination, the examination to be completed within six months from the time the patient is received or three months before the expiration of his sentence. Article 31B, Sections 6(c) and 7(a). A copy of the order for examination is served on the individual to be examined. Art. 31B, Section 6(b).

This Court in *Jennings v. Mahoney*, ... U.S. ....., 30 L. Ed. 2d 146, 92 S. Ct. ..... (1971), refused to strike down a statutory scheme whereby a State official, solely on the basis of accident reports and without affording the motorist a hearing on the issue of fault, could revoke his license, and noted:

> "The District Court in fact afforded this appellant such procedural due process. That court stayed the Director's suspension order pending completion of judicial review, and conducted a hearing at which appellant was afforded the opportunity to present evidence and cross-examine witnesses. Both appellant and the Director testified at that hearing. The testimony of the investigating police officer would also have been heard

except that appellant's service of a subpoena upon him to appear was not timely under the applicable court rules." *Jennings, supra*, 30 L. Ed. at 148.

The *Jennings* court dealt with the serious change of status by administrative action from driver to non-driver. In the instant case, the only change in status is a change in the *place* of incarceration.

Petitioners seek to require an evaluation before evaluation. Such a procedure is not constitutionally mandated. Petitioners' citations to *Timmons v. Peyton, supra*, and *Miller v. Blalock*, 356 F. 2d 273 (4th Cir., 1966) are not apposite. *Miller, supra*, involved an individual who was referred to a Virginia State Hospital to determine whether he was mentally competent to plead and stand trial. The finding of the hospital was that he was insane and unable to stand trial. No further action was taken and *Miller* was confined for an indeterminate period to the hospital without a hearing. The Fourth Circuit reversed the finding of the District Court and required that before *Miller* could be confined he must be given a hearing on the question of whether he was, in fact, insane and should be committed only after a judicial finding that he was insane. This is the same procedure which is required under Article 31B.

Petitioners' citation to *Kent v. United States*, 383 U.S. 541 (1966), and *In Re Gault*, 387 U.S. 1 (1967) are distinguishable. *Kent, supra*, and *Gault, supra*, did not concern themselves with the post-adjudicatory or dispositional processes. Juvenile waiver is not analogous to referral for examination as to an indiivdual's status as a defective delinquent. A request for examination may be made only after imposition of an active prison sentence upon a defendant's conviction of one of several classes of criminal offenses. Article 31B, Section 6(a).

Petitioners misconstrue the holding in *State v. Musgrove*, 241 Md. 521, 271 A. 2d 247 (1966), as to the time within which an examination must be made. Article 31B, Section 6(c) states that:

> "No such examination shall be ordered or made if the said person has been released from confinement for the particular crime or offense of which he was convicted or who is within six months of the expiration of his sentence."

Further, Section 7(a) states that

> "They shall state their findings in a written report addressed to the court, not later than six months from the date said person was received in the Institution for examination, or three months before expiration of his sentence, whichever first occurs."

These sections read together clearly indicate that the examination must be made prior to the expiration of the original criminal sentence. The holding in *State v. Musgrove, supra*, was directed solely to those referred to Patuxent Institution who refused examination. The court stated:

> ". . . [W]e are of the opinion that the order of court referring a person to Patuxent for an examination until such time as the procedures for determining whether or not such person is a defective delinquent have been completed could not be defeated by the refusal of such person to submit to the examination required by § 7(a) if the Patuxent staff cannot make its determination without it. It is clear that a person cannot complain of the action, or inaction, of others when he is the cause of the delay that ensues." *State v. Musgrove, supra*, 241 Md. at 532.

After referral, if the report is negative, the individual is returned to the Department of Corrections to complete service of his sentence with full credit given for time spent

at Patuxent. Article 31B, Section 7(a). If the examiners believe him to be a defective delinquent, he is afforded a full and prompt judicial hearing at which he is entitled to the assistance of counsel, the services of an independent private psychiatrist, and trial by jury. Article 31B, Sections 8(a), (b), (c). See also *Tippett, supra,* at 1155-1156.

Petitioners further question the looseness of "standards" which are used by the courts in referring individuals for examinations.[9] The most recent statistics showed that of the total number of persons referred to Patuxent Institution for examination since its inception, 66 percent are diagnosed as defective delinquents by the Institution. *Patuxent Institution, Annual Report,* 1971. This indicates that the referring courts are using proper guides and criteria and are not arbitrarily referring individuals for examination.

VII.

PETITIONERS WERE NOT DEPRIVED OF DUE PROCESS DURING THE EXAMINATION STAGE AT PATUXENT AND IN THE FINDINGS OF DEFECTIVE DELINQUENCY AND THE SAME WERE NOT UNRELIABLE FINDINGS OF FACT AND NOT PROCEDURALLY UNFAIR.

Petitioners, in their Argument VIII, set out what they considered to be various deprivations arising throughout the examination and commitment procedure at Patuxent Institution. The State, in their argument, have followed Petitioners' outline in order to answer contentions raised by Petitioners in this argument.

A. The Statutory Provisions

Section 7A has been amended to read as follows: "They shall state their findings in a written report addressed to

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[9] Vague standards in discretionary dispositional process after a full scale criminal trial are not constitutionally defective. *See McGautha v. California,* 402 U.S. 183 (1971) (absence of standards in guiding jury's decision as to death penalty).

the court, not later than six months from the date said person was received in the institution for examination, or three months, before expiration of the sentence, whichever first occurs."

Petitioners continue to state that no opportunity for cross-examination exists at trial on the report submitted by Patuxent Institution.[10] The District Court found that opportunity for confrontation and cross-examination does exist and that the use of hearsay evidence contained in the report is proper. *Sas, supra,* 334 F. 2d 515; *Sas, supra,* 295 F. Supp. at 408.

B. The Fact Finding Process

Petitioners state that the staff finds it useful to go back as far as when an individual was eight years old (J.A. 4, 275). The statement by Dr. Kandel was that "[M]ost of our patients started their difficulties with the law at a very early age, somewhere between 8 and 12" (J.A. 4, 275). Any good psychiatrist or psychologist will obviously delve as completely as he can into the background of the individual being examined in order to assure that mistakes are not made. Further, the lapse of 40 to 45 days before start of formal examination is for the purpose of collecting prior background history on the individual referred to Patuxent Institution in order that the professional staff will have a basis on which to make their examinations.

The testimony below was clear that if the individual summoned to an interview reports and declines to answer or be examined, he is not subject to any disciplinary action. Only when he refuses to report may he be disciplined

[10] This is substantially the same argument used by Petitioners throughout their Brief. It has been answered more fully in State's Arguments II and IX.

for failure to obey an order of the institutional staff, *Sas, supra*, 295 F. Supp. at 411 (J.A. 4, 217-223).

C. The Adjudicative Process

Petitioners' misnomer of the diagnostic staff conference as "the adjudicative process" is enlightening. Petitioners continue to insist that a staff of some three dozen professional persons are vindictive, callous individuals who disregard anything that does not please them. Nothing could be further from the truth. When the individual enters the institution he is told of all the diagnostic procedures; he is given an opportunity to dispute all material before or at the diagnostic staff conference and any conflict of fact which cannot be resolved is indicated as such to the court (J.A. 4, 201, 202, 203, 208-209). Further, Petitioners misconstrue the testimony of what is of critical significance (J.A. 4, 275, 276), Dr. Kandel's testimony merely indicates that unverified minor offenses coupled with recent major offenses indicate persistent anti-social behaviour and that such minor offenses would not require effort to verify.

D. The Fact Gathering Process

Petitioners again misrepresent the purpose and procedures used in evaluating an individual as a defective delinquent. They make the broad statement that the fact finding process bristles with potential unreliability. Such a statement is without foundation in the record and the same is disproven by actual experience. The majority of reports used by Patuxent Institution come from official files, that is, F.B.I. reports, prior Department of Correction Reports, Juvenile Court records, prior reports of the various social service agencies, and an extensive social service history taken at the Institution from the individual, his family and associates. The majority of these reports are

made in the normal course of business by competent individuals and little if any "rumor and gossip" enters the same. The "dossier" is not compiled in secret and not permanently sealed. Access to the records by an individual's attorney is unlimited.

Petitioners show their mistrust of professional staff by the following quote from page 63 of their Brief. "The battery of tests administered to the person are capable of maladministration. Far greater dangers arise when the testing involves questions of judgment and discretion." This timeworn shibboleth rests on the following assumptions, that the professional staff is incompetent and should not be permitted to use the judgment and discretion for which they spent long years in training to develop. Succinctly stated, Petitioners do not trust psychiatrists, psychologists and social workers. The record amply demonstrates that the professional staff at Patuxent Institution is competent. See *Sas, supra*, 295 F. Supp. at 420 Footnote 79.

1. *Right to Counsel During Examination*

The District Court did not find counsel constitutionally mandated during the examination nor did the Fourth Circuit find it necessary in *United States v. Albright, supra.* See also *Sas, supra*, 295 F. Supp. at 410. Further, the Fourth Circuit held that the due process clause did not require counsel at the time of the examination. *Tippett, supra*, 436 F. 2d at 1158. Petitioners' citation to *Timmons v. Peyton, supra*, again reaffirms that counsel may not be present at a psychiatric examination. Petitioners' contention that counsel be available earlier in the examination process is again without substance. The cases cited by Petitioners all deal with the adjudicatory stage of criminal prosecutions and not with a subsequent post-adjudicatory disposition. If the individual is found not to be a defective delinquent, then

he is returned to the Department of Corrections to serve the balance of his sentence. Only at such time as he is diagnosed as a defective delinquent are further proceedings contemplated and counsel at that point has the absolute right to review the files at Patuxent Institution and Petitioners have the absolute right to a privately retained psychiatrist.

2. *Right to Assistance of Experts During Examination*

This contention again is patently frivolous. The Fourth Circuit in *Tippett, supra,* did not require either counsel or a psychiatrist during examination. The individual ultimately diagnosed as a defective delinquent has this absolute right at a point in time when the same would be effective. To allow a private psychiatrist to participate in the examination would again be an unconscionable waste of funds and would serve no useful purpose.

3. *Right to Counsel During Staff Diagnostic Conference*

This contention confuses the necessity of counsel during the adjudicatory stage of criminal proceedings and the dispositional processes. If the individual is determined to be a defective delinquent, then counsel would have the right to all the reports of the Institution including the findings of the Staff Diagnostic Conference in sufficient time to prepare for the Defective Delinquency hearing. Counsel at this point in the examination is not constitutionally mandated. *Tippett, supra,* at 1158.

E. Subsequent Judicial Proceedings

Petitioners' final contention is premised on improper diagnostic procedures used by Patuxent Institution to determine whether an individual is a defective delinquent. Petitioners state that the "argument of a curative judicial

proceeding is invalid." The findings of the courts in *Sas, supra,* 334 F. 2d, *Director v. Daniels, supra, Sas, supra,* 295 F. Supp. and *Tippett, supra,* found no invalidity in the diagnostic procedures nor has the argument that they were defective been made by the State. The judicial proceedings, as found by the courts, are proper and not constitutionally flawed.

Petitioners' contention that following a determination of defective delinquency, an independent expert would find it impossible to retrace the conclusion reached by the Institution is an unwarranted assumption. There is no limitation placed on the independent psychiatric expert as to the scope or extent of his examination. This contention once again denies the existence of professional competence.

Petitioners' final contention that staff members testifying in court cannot "wash their minds of inadmissible data" is unjustified. Petitioners are obviously referring to the data secured by Patuxent Institution from social service and other correctional agencies. This data is necessary for an informed professional to make a judgment as to a personality disorder and is the type information secured by every professional called upon to make a determination of this type either in private practice or in any mental hospital. Further, Petitioners have the right to contest all this data at trial by having those who wrote the reports subpoenaed into court or by use of the discovery procedures available under Maryland Rules 400-425.

VIII.

PETITIONERS' PRIVILEGE AGAINST SELF-INCRIMINATION IS NOT VIOLATED BY REQUIRING THEM TO SUBMIT TO AN EXAMINATION PURSUANT TO ARTICLE 31B.

This Court has recently reviewed several statutory schemes which involved, as an essential or indispensable

part of their operation, some form of "testimony" by individual citizens. See *California v. Byers*, ... U.S. ....., 29 L. Ed. 2d 9 (1972) ("stop and report" statute); *United States v. Freed*, 401 U.S. 601 (1971) (Registration of firearms).

In *California v. Byers, supra*, 29 L. Ed. 2d at 16, this Court noted that:

> "This case presents the narrow but important question of whether the constitutional privilege against compulsory self-incrimination is infringed by California's so-called 'hit and run' statute which requires the driver of a motor vehicle involved in an accident to stop at the scene and give his name and address. Similar 'hit and run' or 'stop and report' statutes are in effect in all 50 States and the District of Columbia."

Finding the privilege of self-incrimination not infringed by the California statute, this Court concluded:

> "Although identity, when made known, may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent evidence. Here the compelled disclosure of identity could have led to a charge that might not have been made had the driver fled the scene; but this is true only in the same sense that a taxpayer can be charged on the basis of the contents of a tax return or failure to file an income tax form. There is no constitutional right to refuse to file an income tax return or to flee the scene of an accident in order to avoid the possibility of legal involvement." *Byers, supra*, 29 L. Ed. 2d at 21.

Byers, supra, unlike the present case, dealt with a statutory scheme fraught with a "clear and present" danger of criminal prosecution. In the Patuxent preliminary examination and afterwards there is the philosophical potential

for incriminating information to filter its way into some criminal proceeding, but Petitioners cite no instances in practice. In *United States v. Freed, supra*, this Court noted that the non-disclosure of incriminating information, as a matter of practice, is relevant in measuring the hazards of incrimination.

Balanced against the *de minimus* risk of incrimination is the indispensable need for disclosure. *See California v. Byers, supra; United States v. Freed, supra.* The record is replete with testimony that it would be unethical, to say the least, to make an examination without full inquiry into the past history of the individual. (See, for example, J.A. 4, 272-277, 296). Patuxent follows normal procedures recognized throughout the psychiatric community. The District Court found that the examinations are not accusatorial stages of criminal proceedings, did not constitute in-custody interrogation, and were not used to determine or gain evidence to prove a criminal act. They are used merely to discover the individual's mental and emotional condition. *Sas, supra,* 295 F. Supp. at 409, 411. *Wise v. Director, supra,* further stated that ". . . as the applicant's statements did not subject him to criminal liability, there is no constitutional infirmity in the manner in which the examination at Patuxent was conducted . . ." 1 Md. App. at 422. The ". . . right not to incriminate himself is not violated *per se* by requiring him, in an appropriate case, to submit to a mental examination." *United States v. Albright, supra,* at 723.

Judge Sobeloff, of the Court of Appeals for the Fourth Circuit, in his separate opinion agreed that the privilege against self-incrimination was not violated by the examinations at Patuxent Institution as ". . . the legitimate objectives of the legislation would be frustrated were inmates

permitted to refuse cooperation. Granting the inmate the right to silence would in many instances thwart the personal examinations and interviews considered indispensable in determining whether the prisoner is or is not a defective delinquent." *Tippett, supra*, 1162.

Not only is the risk minimal and the need for examination indispensable, the potential risk is one that can be handled quite adequately under present procedures, as the District Court noted in reviewing the Defective Delinquency Act.

> "This court accordingly holds that the examination procedures at Patuxent do not violate any right against self-incrimination. This Court entertains no doubt as to this conclusion; but were there any question it would not make the Maryland Act unconstitutional. An objection, if valid, could be made at the time of any later attempt to use such information in any proceeding to convict for crime." *Sas, supra*, 295 F. Supp. at 413.

The absence of any prosecution initiated through the use of statements made during the examination and the holdings in *Wise v. Director, supra*, and *Sas, supra*, 295 F. Supp., render Petitioners' contention untenable (J.A. 4, 204).

IX.

PETITIONERS' RIGHTS TO CONFRONTATION UNDER THE SIXTH AMENDMENT ARE NOT ABRIDGED BY THE HEARINGS HELD PURSUANT TO ARTICLE 31B.

In strictly criminal cases, the District Court found that confrontation was not always necessary where the accused had an opportunity to rebut findings and subpoena witnesses. *Pointer v. Texas, supra; Gonzales v. United States, supra; Sas, supra*, 295 F. Supp. at 407. The discovery procedures available and the ability of Petitioners to sub-

poena witnesses fully guarantees that there will be no denial of the right of confrontation. *Brunson v. Director, supra; Director v. Daniels, supra.*[11]

The Fourth Circuit held that the hearsay exception did not violate constitutional guarantees:

> "The answer to all of these objections is that with respect to state action repeated decisions of the Supreme Court has put it beyond the range of further debate that the 'due process' clause of the fourteenth amendment has not the effect of imposing upon the states any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with." *Sas, supra,* 334 F. 2d at 515. See also *Director v. Daniels, supra,* 243 Md. at 44-46; *Kay v. United States,* 255 F. 2d 476, (4th Cir., 1958), *Thomas v. Hogan,* 308 F. 2d 355 (4th Cir., 1962); *Sas, supra,* 295 F. Supp. at 408-409.

Specht v. Patterson, supra, cited by Petitioners is not apposite as notice and hearing were absent. Petitioners' contention that the hearsay exception allows introduction of past contacts with courts, law enforcement agencies including record of arrests, juvenile offenses and convictions is misleading. These are admissible only when contained in the report of Patuxent Institution to the court and then only to show past antisocial behaviour. *Walker v. Director,* 6 Md. App. 206, 258 A. 2d 900 (1969).

The admission of the Institutional Report does not violate the spirit or meaning of the Sixth Amendment to the Constitution of the United States.

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[11] See State's Argument II.

X.

THE STANDARD OF PREPONDERANCE OF THE EVIDENCE DOES NOT VIOLATE DUE PROCESS.

The short answer to Petitioners' contention is that the Circuit Court, the Court of Appeals of Maryland, the District Court, and the Fourth Circuit, all held that the due process clause does not require the states to adopt any particular form or mode of procedure. *Sas, supra*, 334 F. 2d at 515; *Director v. Daniels, supra*, 243 Md. at 25; *Sas, supra*, 295 F. Supp. at 408-409. See also State's Argument II for the procedural safeguards afforded Petitioners.

> "The burden of persuasion is in the same category. We might all be happier had it been stated in terms of clear and convincing proof rather than in terms of a preponderance of the evidence. However meaningful the distinction may be to us as judges, however, it is greatly to be doubted that a jury's verdict would ever be influenced by the choice of one standard or the other. We all know that juries apply the preponderance standard quite flexibly, depending upon the nature of the case. In any event, in the present state of our knowledge, choice of the standard of proof should be left to the state. A legislative choice of the preponderance standard, the same standard governing civil commitments of mentally ill persons who have no history of criminality, ought not to be held in violation of due process requirements when we have no firm foundation for an evaluation of the practical effects of the choice." *Tippett, supra*, 436 F. 2d at 1158-1159.

Even within the criminal trial itself, this Court approved, in *Lego v. Twomey*, ... U.S. ....., 30 L. Ed. 2d 618 (1972), the use of the "preponderance of the evidence" test as to the proof of the voluntariness of a confession.

A determination of defective delinquency is not a finding of criminal responsibility and *In Re Winship*, 397 U.S. 358, (1970) is not applicable.[12]

XI.

PETITIONERS WERE NOT DENIED CONSTITUTIONAL GUARANTEES IN THE REVIEW PROCEDURES AND IN THE ANNUAL EXAMINATIONS BY THE INSTITUTIONAL BOARD OF REVIEW.

Article 31B, Section 10, allows a court redetermination of the issue of defective delinquency after expiration of two-thirds of the patient's sentence or two years, whichever is greater. Additional court reviews every three years thereafter provides those committed to Patuxent Institution with sufficient safeguards to test the basis of their commitment and does not violate the due process or equal protection guarantees of the constitution.

Petitioners further argue that the yearly reexamination by the Institutional Board of Review is flawed by the information contained in the original evaluation of the patient. This contention has been answered but nevertheless, the information collected during the evaluation prior to a patient's commitment to Patuxent Institution is reliable and presents the Institutional Board of Review with sufficient material along with their interview of the patient and his progress reports to determine his status within the Institution. Contrary to Petitioners' contention, the patient is given the opportunity to be heard before the Institutional Board of Review and may present whatever he feels neces-

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[12] *In re Winship*, 397 U.S. 358 (1970) concerned a 12-year-old charged with delinquency for having taken money from a woman's purse. This Court held that ". . . [t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute *the crime with which he is charged*," 397 U.S. at 364, and then went on to hold, 397 U.S. at 368, that this standard was applicable, too, ". . . during the *adjudicatory* stage of a delinquency proceeding."

sary. As a practical matter, the patient cannot refuse attendance at the Board of Review meetings and if he declines to appear, a member of the Board goes to see the patient to assure the Board that he is voluntarily refusing to appear.

Petitioners' final contention is that testimony by the treating psychiatrist is improper. While not the best practice, it is not as traumatic as Petitioners would have this Court believe (J.A. Md., 239-240). The District Court found that the practice of having the treating psychiatrist testify at court hearings had been eliminated at the time of the hearing in District Court and held that this practice was not illegal or improper. *Sas, supra,* 295 F. Supp. at 419 (J.A. Md., 294, 739) (J.A. 4, 317-318). The practice of refusing private psychiatrists to patients committed to Patuxent Institution is not unconstitutional nor is it bad practice. *Sas, supra,* 295 F. Supp. at 419 (J.A. Md., 556-557).

XII.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AND THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DID NOT ERR IN FINDING THAT THE ACT WAS CONSTITUTIONAL ON ITS FACE, INTERPRETATION, APPLICATION, ADMINISTRATION AND RESULT.

Contrary to Petitioners' contention, the District Court found ". . . as a fact, and conclude[d] as a matter of law, that the Maryland Act is not only constitutional on its face, but also in its *interpretation, application, administration and results.*" *Sas, supra,* 295 F. Supp. at 420 [Emphasis supplied.] The District Court did consider the question whether the Act was civil or criminal and made its determination that not only was the Act civil (See State's Argument IIA) but that "[A]s will be seen, the Maryland Act provides all the due process requirements (See State's Argument IIA) set forth in the last quoted text language.

whether the Maryland Act be regarded as civil or criminal." [Footnote omitted] *Sas, supra,* 295 F. Supp. at 405. See also *Sas, supra,* 401-405 and *Director v. Daniels,* 243 Md. at 37-40, where the courts did consider the tests laid down in *Kennedy v. Mendoza-Martinez, supra.*

Likewise, their contentions concerning, facial constitutionality, (See State's Argument I) the self-incrimination questions, (See State's Argument IIB and XI) and the "property" offender arguments (See State's Argument IV) have been dealt with in other portions of the State's Brief.

In addition, it must be emphasized that the District Court's conclusions were not based solely upon abstract legalities; instead, they were the product of analysis of Maryland State law and particular testimony physically presented before it. In these circumstances, particularly, the District Court's conclusions ought not be disturbed. See, generally, Federal Rules of Civil Procedure, Rule 52(a); *Huddleston v. Dwyer,* 323 U.S. 232 (1944).

Part of those firm unequivocal findings of the District Court included its analysis of the effective treatment available at Patuxent. This factual finding is contrary to the entire thread of argument throughout Petitioners' Brief (See State's Argument IID) that no one cares and that no one does anything for those committed to Patuxent Institution. Petitioners dwell on the fact that incarceration will be for life. Not only does the record reflect that people do care and things are done for those committed to Patuxent Institution, but there is no one at Patuxent Institution today who was there when the Institution opened in 1955 and who has not had at least one opportunity to be free on parole. (The only exception is an individual transferred to a mental hospital who escaped from that hospital and was at large for 10 years). The State reiterates its contention

that Patuxent Institution is not a life sentence behind bars, but rather the only hope that Petitioners have for life in free society.

CONCLUSION

Our several century search to make this world more humane, even while exploring others, has directed our Nation in general and the State of Maryland in particular to ask questions about the nature and destiny of unreformed men that the legal profession alone could not answer.

The answers given by our psychiatric and sociological brethern, though possessing that degree of tentative incompleteness which limits all human endeavors, ought not be discarded or ignored by lawyers; and the effective procedures, treatment and therapy of our professional colleagues and brothers ought not to be summarily rejected because they do not readily fit into procrustean beds of common law procedures; although these procedures may be novel and unusual, they are certainly not cruel; although effective and expedient, they are certainy not unfair; although personalized, they are not incriminatory; the psychiatric process of treatment may also be the due process of law when it is constructed with concern, applied with understanding, and remedied, where misapplied, by fair procedures.

The zeal of Petitioners and Amici are eloquent proof that inevitable human errors that occur at Patuxent will not remain unnoticed but will be corrected.

These are not the beliefs of the State of Maryland alone, but are attested to by the courts, federal and state, trial and appellate, that have with concern, diligence and foresight, weighed Patuxent in the balances and found it not wanting of fairness or effectiveness.

Thus, it is respectfully submitted that the Judgment of the United States Court of Appeals for the Fourth Circuit be affirmed.

Respectfully submitted,

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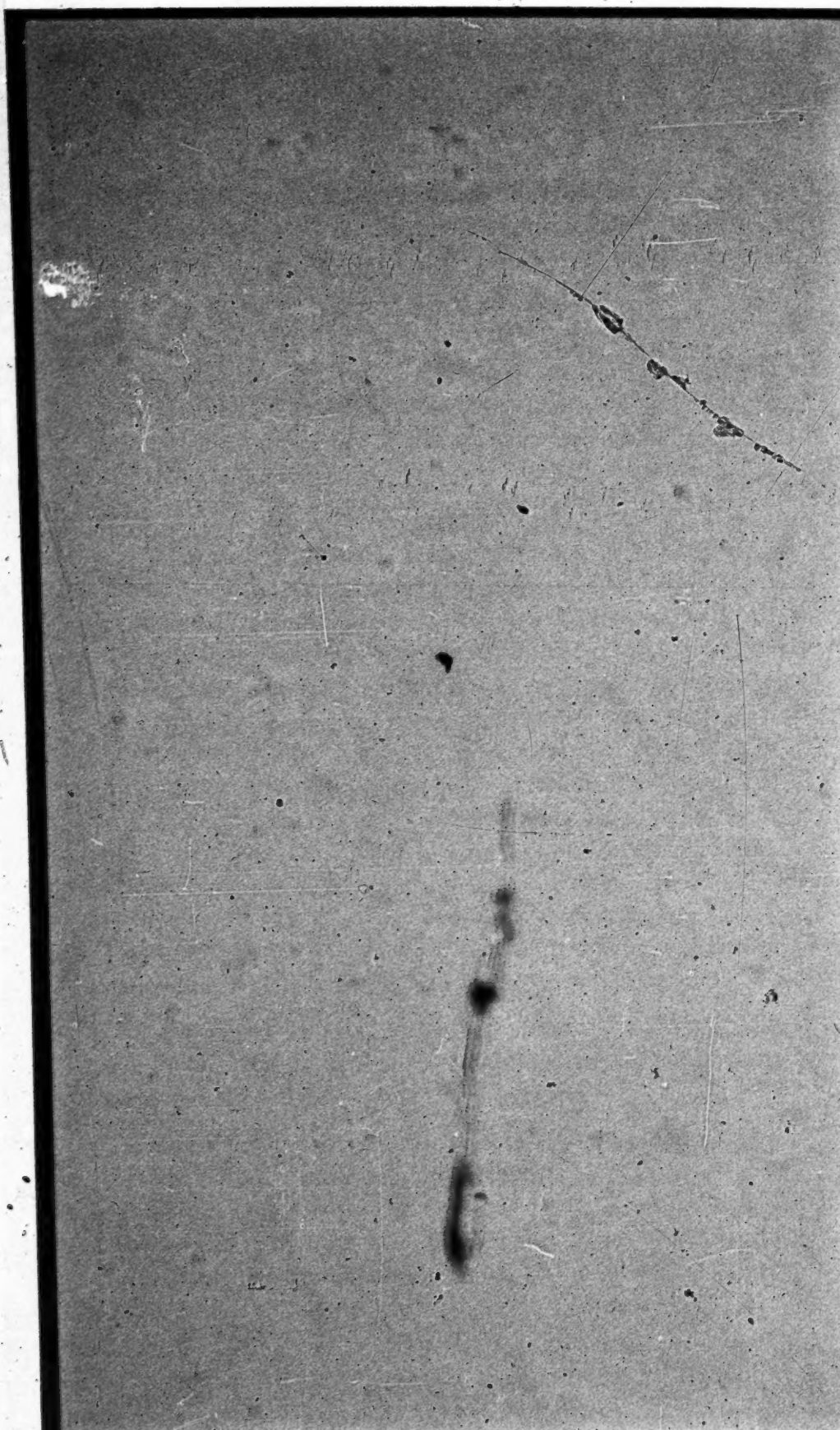

APPENDIX A

ARTICLE 31B.

DEFECTIVE DELINQUENTS.

PATUXENT INSTITUTION

§ 1. Established: board of Patuxent Institution.

(a) *Institution established; part of Department of Public Safety and Correctional Services.* — There shall be an institution for defective delinquents, with the powers and duties as provided in this article or elsewhere in the laws of this State. Said institution shall be established at Jessup, shall be known as the Patuxent Institution and shall be part of the Department of Public Safety and Correctional Services.

(b) *Board of Patuxent Institution — Powers generally; membership; appointment; terms; vacancy; removal of members; compensation.* — Subject to the authority of the Secretary of Public Safety and Correctional Services as provided for in Article 41 of this Code or elsewhere in the laws of Maryland, the board of Patuxent Institution shall possess all of the powers bestowed by law upon Patuxent Institution. The board shall consist of the chairman of the board and four associate members, who shall be appointed by the Secretary of Public Safety and Correctional Services, with the approval of the Governor and with the advice and consent of the Senate. Two of the associate members shall be appointed from the membership of the advisory board of Patuxent Institution, and one of these two associate members shall be a psychiatrist. The chairman and associate members of the board shall serve terms of four years, except that the initial term of the associate members first appointed to the board shall be one, two, three and four years respectively. Any vacancy in the board shall be filled by appointment of the Secretary of Public Safety and Correctional Services, with

the approval of the Governor, and with the advice and consent of the Senate, for the unexpired term. The Secretary, with the approval of the Governor, may remove any member of the board for inefficiency, neglect of duty, or misconduct in office, giving to such member a copy of the charges preferred and the opportunity of being first publicly heard in person or by counsel. If such member shall be removed, the Secretary of Public Safety and Correctional Services shall file in the office of the Secretary of State a complete statement of all charges made against such member, and his findings thereof, together with a complete record of the proceedings. The chairman and associate members shall serve without pay.

(c) *Same — Oath; certificate of appointment.* — Before entering upon the discharge of the duties of his office, each member of said board shall take an oath that he will well and faithfully execute and perform all and singular the duties appertaining to his office according to the laws of the State and the rules and regulations adopted in accordance therewith. The certificate of the appointment by the Governor and Secretary of Public Safety and Correctional Services of any member shall be sent to the clerk of the circuit court of the county or the clerk of the Superior Court of Baltimore City, as the case may be, where the appointee resides, and the clerk of said court shall promptly notify the appointee of the receipt of such certificate warning him that failure to take the aforesaid oath within sixty (60) days shall constitute a refusal of the appointment. The clerk shall notify the Governor of any such failure.

(d) *Same — Quorum, execution of papers.* — A majority of said board shall be a quorum for the transaction of all business, and shall have full power and authority to

do and perform any and all acts that the said board is by law authorized and empowered to do and perform; and the said board, or a majority thereof, may authorize any of its members by and in its name to execute on its behalf any and all papers that the said board has power and authority to execute.

(e) *Same — Incidental powers; witnesses.* — The board of Patuxent Institution shall have any and all incidental powers and authority appropriate and convenient to enable the said board to fully discharge the powers of management, control and supervision conferred upon them by this article. Said board shall have power to summon witnesses before it and to administer oaths or affirmations to such witnesses whenever, in the judgment of the board, it may be necessary for the effectual discharge of its duties under this article; and any person failing to appear before the board at the time and place specified in answer to said summons, or refusing to testify, shall be punishable by a fine of not less than twenty-five nor more than fifty dollars; false swearing on the part of any such witness shall be deemed perjury, and shall be punished as such.

(f) *Same — Rules and regulations,* — Said board shall have full power and authority to make, repeal or amend such rules and regulations, not inconsistent with law or applicable rules and regulations of other State agencies, for the operation, discipline and conduct of the Institution, the inmates, staff and employees, by this article placed under its supervision or control, as may be necessary or convenient for the proper administration of the power and discretion conferred upon it by this article.

(g) *Same — Interest in contracts; rewards or gifts.* — (1) No member of said board, or the advisory board hereinafter created, or any officer, member of the staff or em-

ployee of Patuxent Institution shall be directly or indirectly concerned or interested in any contract, purchase or sale made, on the recommendation of said board, or shall accept any reward or gift or any promise of any reward or gift directly or indirectly from any person interested in any contract, purchase or sale made on the recommendation of said board, and every member of said board and every officer, member of the staff or employee of Patuxent Institution shall make report to said board of all such offenses coming to his knowledge.

(2) No member of said board, or of the advisory board hereinafter created, or any officer, member of the staff or employee of Patuxent Institution, shall accept any reward or gift, or any promise of reward or gift, from any inmate in said Institution, or from anyone on his behalf, or shall receive any devise or bequest, or any promise of devise or bequest, from any such inmate, or from any person on his behalf, or shall enter into any contract with such inmate, or with any person on his behalf. All such gifts, rewards, bequests, devises, promises and contracts shall be void.

(3) Any violation of the provisions of this subsection shall be sufficient cause, in the case of a member of said board or officer of Patuxent Institution, for removal from office, and in the case of any other employee of the Institution for his dismissal. (An. Code, 1951, § 1; 1951, ch. 476, § 1; 1961, ch. 629, § 1; 1962, ch. 16; 1970, ch. 401, § 5.)

§ 2. Director.

The director shall be the chief administrative officer of the Patuxent Institution, and shall be a trained, able and competent psychiatrist with at least five years' experience in the practice or teaching of psychiatry. The director holding office at the time of the passage of this section

shall continue to hold office at the pleasure of the Secretary of Public Safety and Correctional Services. Any successor as director shall be appointed by the Secretary of Public Safety and Correctional Services from a list of three nominees proposed to the Secretary by a special committee composed of the professor of psychiatry at the Medical School of the University of Maryland, the professor of psychiatry of the Medical School of the Johns Hopkins University, the deputy secretary for correctional services, and the chairman of the board of Patuxent Institution. The secretary may reject any list of three nominees and request another list. Three members of said special committee shall be empowered in the absence of the full committee to act for the committee. The director shall receive a salary as fixed in the budget, which shall not be less than fifteen thousand dollars ($15,000.00) annually. (An. Code, 1951, § 2; 1951, ch. 476, § 2; 1961, ch. 629, § 1; 1970, ch. 401, § 5.)

§ 3. Officers and employees.

(a) *Enumeration, qualifications, duties and salaries.* — There shall be three associate directors of the said Institution. One of said associates shall be a trained, able, and competent psychiatrist of at least three years' experience in the practice or teaching of psychiatry; and one of said associates shall be a trained, able, and competent behavioral scientist of at least three years' experience in the practice or teaching of his specialty; and said associates shall assist primarily in the diagnostic and treatment duties of the Institution. The third of said associates shall be particularly charged, under the director, with the custodial duties of the Institution. There shall also be in the Institution at least three psychiatrists or clinical psychologists, at least four trained social workers (one of whom

shall be a psychiatric social worker), a physician, and a dentist, together with such other psychiatrists, psychologists, social service workers and sociologists, physicians, administrative officers, custodian, clerks, and other officers and employees as may be provided in the budget from time to time. Except as otherwise provided herein, the salaries of all officers and employees in the Institution shall be as provided in the budget.

(b) *Professional positions not included in merit system; manner of appointment.* — Persons in professional positions in the said Institution, including the associate directors and all social workers and sociologists, psychiatrists, psychologists, physicians and dentist shall be appointed by the director, subject to the approval of the board of Patuxent Institution, and shall not be included in the merit system under the provisions of Article 64A of the Annotated Code. (An. Code, 1951, § 3; 1951, ch. 476, § 3; 1957, ch. 762; 1961, ch. 629, § 1; 1969, ch. 115.)

§ 4. Advisory board; surgical operations.

(a) *Advisory board for defective delinquents.* — The advisory board for defective delinquents is hereby established as part of the Department of Public Safety and Correctional Services. It shall consist of the professor of psychiatry in the Medical School of the University of Maryland, or someone designated by him; the professor of psychiatry at the Johns Hopkins Medical School, or someone designated by him; two competent sociologists from the University of Maryland and the Johns Hopkins University, one each to be appointed by the respective presidents of these two institutions; the full-time professor of constitutional law at the University of Maryland School of Law, or if there be no such full-time professor, or if he is unable to serve, such other full-time professor

of the University of Maryland School of Law as may be designated by the dean of said school; the Director of Parole and Probation; and two practicing members of the Maryland bar, with at least five years' experience in the trial of civil and/or criminal cases, appointed by the Secretary of Public Safety and Correctional Services, with the approval of the Governor, to serve for a five-year term each. The advisory board shall organize by electing a chairman, and shall meet on the call of the chairman or of the Secretary of Public Safety and Correctional Services at least once in every three months. One of the members of the said board shall serve as secretary upon designation by the chairman and shall keep full and accurate minutes of such meetings and preserve the same. The members of the advisory board shall receive a per diem payment for every day spent in the duties of the board. The advisory board shall confer with the staff of the Institution, and with the board from time to time, and shall give to the Institution a general consultative and advisory service on problems and matters relating to its work.

(b) *Authority to perform surgical operation required.* — No surgical operation shall be performed as treatment of any defective delinquent except as authorized by the approval of the advisory board and also by the written consent of the defective delinquent, his nearest relative, or the order of the court. (An. Code, 1951, § 4; 1951, ch. 476, § 4; 1957, chs. 558, 762; 1961, ch. 629, § 1; 1970, ch. 401, § 5.)

§ 5. Defined.

For the purposes of this article, a defective delinquent shall be defined as an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emo-

tional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment. (An. Code, 1951, § 5; 1951, ch. 476, § 5; 1957, ch. 558; 1961, ch. 629, § 1.)

§ 6. Requests for examination.

(a) *For whom requests may be made.* — A request may be made that a person be examined for possible defective delinquency if he has been convicted and sentenced in a court of this State for a crime or offense committed on or after June 1, 1954, coming under one or more of the following categories: (1) A felony; (2) a misdemeanor punishable by imprisonment in the penitentiary; (3) a crime of violence; (4) a sex crime involving: (A) Physical force or violence, (B) disparity of age between an adult and a minor, or (C) a sexual act of an uncontrolled and/or repetitive nature; (5) two or more convictions for any offenses or crimes punishable by imprisonment, in a criminal court of this State. A person convicted and sentenced for a crime or offense within one of the categories listed above in this subsection, except that such crime or offense was committed before June 1, 1954, shall be subject to this article with the same effect as if said crime or offense had been committed after June 1, 1954, if after said date such person is adjudged to have broken the terms of any parole or probation on which he has been released from said sentence.

(b) *Who may make requests.* — The request for such examination may be made by the Department of Correction or by the State's attorney or assistant State's attorney who prosecuted the person for a crime or offense specified hereinabove in this section, on any knowledge or suspicion

of the presence of defective delinquency in such person. Such person himself, or his attorney in his behalf, may make such a request of the court. Whenever a request for examination comes from any such source the court may order such person to be examined by the institution for defective delinquents to ascertain if he or she is a defective delinquent. The court also may make such an order on its own initiative. A copy of any order for examination shall be served upon the person to be examined.

(c) *When requests may be made.* — Such an examination may be requested and made at any time after the person has been convicted and sentenced for a crime or offense specified hereinabove in this section, provided that the said person has been sentenced to a period of confinement in a penal institution or is then serving such a sentence. No such examination shall be ordered or made if the said person has been released from confinement for the particular crime or offense of which he was convicted.

(d) *How requests made.* — The request for such an examination shall be by petition filed with the court having custody of or jurisdiction over the said person, stating therein the reasons for suspecting or supposing the presence of defective delinquency in the said person. The court in ordering such examination shall do so by formal written order directed to Patuxent Institution. When the person to be examined is in the custody of the Department of Correction, such order shall also be directed to the Department of Correction, which shall forthwith cause the transfer of the person to the custody of Patuxent Institution.

(e) *Custody after examination ordered; jurisdiction of defendant.* — After the court has ordered an examination to be made under this section, said person shall be retained in custody, initially of the Department of Correction until

his transfer to Patuxent Institution and thereafter in the custody of Patuxent Institution, until such time as the procedures of this subtitle for the determination of whether or not said person is a defective delinquent have been completed, without regard to whether or not the criminal sentence to which he was last sentenced has expired. The court which last sentenced the defendant, whether or not the term of court in which he was sentenced has expired shall retain jurisdiction of the defendant for the purpose of any of the procedures specified in §§ 6, 7, 8 or 9 hereof, except that the Criminal Court of Baltimore City and the Circuit Court of Anne Arundel County shall for such purpose have jurisdiction of a person last sentenced by the Municipal Court of Baltimore City and the People's Court of Anne Arundel County, respectively. (An. Code, 1951, § 6; 1951, ch. 476, § 6; 1957, ch. 558; 1960, ch. 43, § 3; 1961, ch. 629, § 1; 1963, ch. 283; 1967, ch. 348.)

§ 7. Examinations.

(a) *By whom made; report of findings to court; time spent in institution, etc., credited on sentence.* — Any such examination shall be made by at least three persons on behalf of the institution for defective delinquents, one of whom shall be a medical physician, one a psychiatrist, and one a psychologist. They shall assemble all pertinent information about the person to be examined, before proceeding therewith, including a complete statement of the crime for which he has been sentenced, the circumstances of such crime, the court in which he was sentenced, the nature of the sentence, copies of any probation or other reports which may have been made about him, and reports as to his social, physical, mental and psychiatric condition and history. On the basis of all the assembled information, plus their own personal examination and study of the said person,

they shall determine whether in their opinion, or in the opinion of a majority of them, the said person is or is not a defective delinquent. They shall state their findings in a written report addressed to the court, no later than six months from the date said person was received in the Institution for examination, or before expiration of his sentence, whichever last occurs. If the substance of the report is that the said person is not a defective delinquent, he shall be retained in the custody of the Department of Correction under his original sentence as if he had not been examined for possible defective delinquency. Provided, however, that the said person shall be returned to the custody of the Department of Correction with full credit for such time as he has already spent in the institution for defective delinquents or within the custody of the Department of Correction including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of § 688 of Article 27 of the Code.

(b) *Additional examinations by psychiatrist in certain cases.* — In addition to the examination provided in the foregoing subparagraph (a), whenever a request has been made to examine any person for defective delinquency, other than a request made by such person himself or by his attorney on his behalf, and whenever the court has on its own initiative ordered examination of any person, then such person shall be entitled, upon request, to be examined by a practitioner of psychiatry of his own choice for the purpose of determining whether he is a defective delinquent within the terms of this article; and the reasonable costs of such examination shall be defrayed by the State of Maryland from the appropriations to the judiciary, in such amount as may be approved by the court. The report of examination made by such psychiatrist shall

be submitted in writing addressed to the court. (An. Code, 1951, § 7; 1951, ch. 476, § 7; 1957, chs. 558, 762; 1961, ch. 629, § 1; 1963, ch. 283.)

§ 8. Hearings.

(a) *When required; defendant to be advised of right to counsel.* — If the institution for defective delinquents in its report on any person shall state that he is a defective delinquent, the court shall forthwith summon the person before it and advise him of the substance of the report and of the pendency of the hearing hereinafter provided; the court shall further advise him of his right to be represented at said hearing by counsel of his choice, or if he has no choice, by competent counsel appointed by the court.

(b) *Appointment and rights of counsel.* — Unless appearance of counsel chosen by the person is entered within twenty days following the proceeding set forth in subsection (a) hereof, the court shall appoint counsel to represent the person. Counsel for the person and for the State shall have access to all records, reports and papers of the institution relating to the person, and to all papers, in the possession of the court bearing upon the person's case, including a copy of the report of the institution.

(c) *When hearing held; jury.* — The hearing for determination of defective delinquency shall be held no less than thirty days following designation of counsel, unless acceleration of the time is requested by the person or his counsel. Upon the application of the State or of the person for a jury trial, or upon its own motion, the court shall empanel a jury of twelve persons to be selected by the court from the jurors then in attendance upon said court; or if the court is in recess, the jurors shall be selected from those in attendance at the term of court at which said

petition is heard. The court shall direct such jury after hearing to find specially, by its verdict, whether the person is a defective delinquent as defined in § 5. In the absence of request for finding by a jury, the court may make such determination sitting as judge and jury. (An. Code, 1951, § 8; 1951, ch. 476, § 8; 1957, ch. 762; 1960, ch. 43, § 3; 1961, ch. 629, § 1; 1963, ch. 283.)

§ 9. Sentence.

(a) *When defendant found not to be a defective delinquent.* — If the court or the jury, as the case may be, shall find and determine that the said defendant is not a defective delinquent, the court shall order him returned to the custody of the Department of Correction, and he shall begin or resume his period of confinement on said conviction as if he had not been examined for possible defective delinquency. Provided, however, that the said defendant shall be returned to custody under his original sentence with full credit for such time as he has already spent in the institution for defective delinquents or within the custody of the Department of Correction including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of § 688 of Article 27 of the Code.

(b) *When defendant found to be a defective delinquent.* — If the court or the jury, as the case may be, shall find and determine that the said defendant is a defective delinquent, the court shall so inform the defendant, and shall order him to be committed or returned to the institution for confinement as a defective delinquent, for an indeterminate period without either maximum or minimum limits. In such event, the sentence for the original criminal conviction, or any unexpired portion thereof, shall be and remain suspended, and the defendant shall no longer be

confined for any portion of said original sentence, except as otherwise provided herein. Instead, the defendant shall thenceforth remain in the custody of the institution for defective delinquents, subject to the provisions of this article. (An. Code, 1951, § 9; 1951, ch. 476, § 9; 1957, ch. 762; 1961, ch. 629, § 1.)

§ 10. Petition for review.

(a) *Who may file; hearing and determination.* — After any person shall have been committed under § 9 (b) as a defective delinquent, shall have been confined for two years after such commitment, and shall have been confined for a total period, including any period of confinement under his original sentence prior to commitment under § 9 (b), equal to two thirds of his original sentence, such person or anyone in his behalf, including the director or any officer or employee of Patuxent Institution, may file a petition requesting that such person be brought before the court in which such petition is filed for the purpose of having the defective delinquency of such person redetermined. Such a petition may be filed in the law courts of the county or Baltimore City, as the case may be, either where such person was originally sentenced or which was the bona fide residence of such person when originally sentenced. The court shall forthwith proceed to hear and determine the matter. If the person so confined, or anyone in his behalf, shall pray a jury trial, the court shall empanel a jury of twelve persons to be selected by the court from the jurors then in attendance upon said court; or if the court is in recess, the jurors shall be selected from those in attendance at the term of court at which said petition is heard. Any party in interest shall have the right to counsel and to process to compel the attendance of witnesses. If the court or jury, as the case

may be, shall determine that such person is a defective delinquent, the court shall order said person recommitted to the institution from which he immediately came; otherwise he shall be discharged from such confinement and custody, or in the discretion of the court committed under his original sentence, less such time as he has already served in the institution for defective delinquents or within the custody of the Board of Correction, including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of § 688 of Article 27 of the Code which shall apply to such person's period of commitment to Patuxent Institution with any variation of the regulations issued under said section as the Board of Correction shall consider appropriate in the particular case.

(b) *Application for further review not to be made within three years.* — After the right to apply for any such petition for review under the provisions of this section shall have been exercised once, it shall not again be sought under the provisions of this section within less than three years following the prior seeking of a petition for review from confinement under the same commitment.

(c) *Right to petition for habeas corpus not affected.* — The right to review specified in this section shall not be construed to deprive the defendant of his right to petition for habeas corpus as it might otherwise exist. (An. Code, 1951, § 10; 1951, ch. 476, § 10; 1957, chs. 378, 762; 1961, ch. 629, § 1.)

§ 11. Appeal.

From any court order issued under the provisions of § 9, or of § 10, within thirty (30) days after the passage of the order, application may be made to the Court of Special Appeals for leave to appeal from the order. The

application for leave to appeal shall be in such form as the Court of Special Appeals may, by its rules, prescribe. If the Attorney General or the State's attorney shall state an intention to file an application for leave to appeal, the order may be stayed. If the application for leave to appeal is granted, the procedure for appeal shall conform with the rules of the Court of Special Appeals. On appeal, the Court may affirm, reverse or modify the order appealed, or it may remand the case for further proceedings. If the application for leave to appeal is denied, the order sought to be reviewed shall become final. (An. Code, 1951, § 11; 1951, ch. 476, § 11; 1957, ch. 558; 1960, ch. 43, § 3; 1961, ch. 629, § 1; 1966, ch. 12, § 5.)

§ 11A. Same — Poverty of defendant.

Whenever a defendant desires to file an application for leave to appeal in order to appeal as provided in § 11, and is unable by reason of poverty to pay the cost of the application and of appeal, he may file, with the court making the order from which appeal is sought, a petition under oath alleging the fact of his poverty and his inability to defray the expense of making application and of appealing. The court upon being satisfied of the defendant's poverty shall sign an order directing that all costs, including but not limited to, all court costs, the cost of preparing the transcript of testimony, the cost of preparing and transmitting the record, and the cost of the briefs, appendices and printed record extract necessary in connection with the appeal shall be paid by the political subdivision from which the appeal is taken and that the record shall be transmitted to the Court of Special Appeals at the expense of the political subdivision. A copy of the order shall be included in the record transmitted to the Court of Special Appeals and the payment of all filing fees to the Clerk of the Court of Special Appeals in connection with the appeal

are waived. If counsel prosecuting the appeal on behalf of the defendant has been appointed as such counsel by the court making the order appealed from or by the Court of Special Appeals, the Court of Special Appeals may allow him a fee in an amount which the Court shall think proper for his services in the appeal, the fee to be paid by the political subdivision. (1960, ch. 43, § 3; 1961, ch. 629, § 1; 1966, ch. 12, § 5.)

Institutional Board of Review

§ 12. Composition; quorum; vacancy.

The institutional board of review shall consist of the director, the three associate directors, the professor of the University of Maryland School of Law who is a member of the advisory board, either of the members of the Maryland bar who are members of the advisory board and a sociologist to be appointed by the board of Patuxent Institution from the faculty of an accredited institution of higher education in Maryland. Four members, including either the professor of law or one of the members of the bar who is a member of the advisory board shall constitute a quorum. The board of Patuxent Institution if the position of director is vacant, or the director if a position of associate director is vacant, shall appoint from the staff of the Institution a substitute member of the institutional board of review to serve during the vacancy. (An. Code, 1951, § 12; 1951, ch. 476, § 12; 1961, ch. 629, § 1; 1968, ch. 144; 1970, ch. 392.)

§ 13. Duties.

(a) *Part of regular duties in Institution.* — The members of the institutional board of review and such other members of the staff whom the director shall designate to attend with the said board as advisors shall serve in such

capacity as part of their regular work and duties in the Institution.

(b) *Review and reexamination of defective delinquents.* —The institutional board of review shall review and thoroughly reexamine every person held in custodial care as a defective delinquent, not less frequently that [than] once in every calendar year. Such review and reexamination shall be to determine whether such person shall remain classified as a defective delinquent, and in making such determination the board shall assemble such information, use such tests and follow such procedures as then are being utilized to indicate the presence of defective delinquency. The board shall make a recommendation for the future status and treatment of each person so reviewed and reexamined, in writing, and a copy of every such recommendation shall be filed with the records of the Institution.

(c) *Recommendation that defective delinquent remain so classified.* — If the institutional board of review in its review and reexamination of any person shall ascertain that he should remain classified as a defective delinquent and receive further treatment as such, it shall so state in its written recommendation filed with the Institution.

(d) *Leave of absence or parole from Institution.* — If the institutional board of review as a result of its review and reexamination of any person believes that it may be for his benefit and for the benefit of society to grant him a leave of absence or parole from the institution for defective delinquents, it may proceed to arrange for such leave or parole. Any leave of absence or parole shall be granted for a period not to exceed one year. The board shall review the case before the expiration of that time and may review

it at any time during the year, in order to make further or alternate determination. The board may attach to any such leave of absence or parole such conditions as to it seem wise or necessary, including arrangements for the care and supervision of the person granted a leave or parole, by his friends or relatives, by the institution for defective delinquents or by the Department of Parole and Probation, and also including as a condition that the said person shall be steadily employed or otherwise occupied during the time of such leave or parole. The board may at any time revoke a leave or parole, or change the conditions and arrangements therefor. The board may also request the court which imposed upon the person the original sentence resulting in his being subsequently classified as a defective delinquent, to reinstate the said original sentence; and the said court is authorized and empowered following such a request to reinstate and reimpose the said original sentence, and to cause the said person to be held in custody therefor, as provided hereinbelow.

(e) *Employment outside of Institution; collection and disbursement of earnings.* — The leave of absence that may be granted by the institutional board of review may be limited to hours during which a person is suitably employed outside the Institution on such terms as are deemed fair and reasonable by the said board. The earnings from such employment shall be collected by the said board, and from them the said board shall pay to the Institution an amount deemed reasonable by the said board in the particular case for such person's board, lodging, supervision and treatment, shall pay to such person or on his behalf amounts necessary for his travel and other proper expenses outside the Institution, and shall accumulate the remainder in a fund held for such person's benefit. If such person is later granted

parole or leave of absence not limited to hours of employment the board may pay him from such fund amounts deemed necessary and proper by the board, and upon such person's unconditional release from custody, or upon his death, the board shall pay the entire remaining fund to him or his estate. If said person is later transferred to the custody of the Department of Correction, any such fund shall be transferred to the Department of Correction to be held in a separate account for said person, and shall be subject to applicable rules for the disbursement thereof as are established by the Board of Correction. While any such fund is held the board shall pay from its amounts directed to be paid by order of court for the support of such person's dependents, but the fund shall otherwise be exempt from attachment, levy, or lien, and any contract or agreement whereby such person shall purport to waive such exemptions shall be void.

(f) *When court to release from custody of Institution or grant leave of absence or parole.* — If the institutional board of review as a result of its review and reexamination of any person believes that he has sufficiently improved to warrant his unconditional release from custody as a defective delinquent, it shall so inform whatever court has jurisdiction over the person. The court then shall make such further study of such person as seems necessary, and may at its discretion summon such person before it for a further hearing, together with any witnesses whose testimony may be pertinent and together with any relevant documents or other evidence. On the basis of such reports, study and possible hearing, the court shall determine whether the person before it shall be released unconditionally from custody as a defective delinquent, released conditionally on a leave of absence or parole, returned to

the custody of the Institution as a defective delinquent, or returned to the Department of Correction, to serve the original sentence upon which he was committed prior to being classified as a defective delinquent. Upon return of a person to the custody of the Department of Correction there shall be deducted from the original sentence all time spent in the custody of Patuxent Institution and in the custody of the Department of Correction. The Department shall make such allowances or (disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of § 688 of Article 27 of the Code. Patuxent Institution shall furnish the Department of Correction with such information from the records of such person's period of confinement in the Institution as the Board of Correction shall reasonably require for determining the application of the said § 688, which shall apply to such person's period of commitment to Patuxent Institution with any variation of the regulations issued under said section as the Board of Correction shall consider appropriate in the particular case. The power of the court to provide for a leave of absence or parole for any such person before it shall be the same as that of the institutional board of review, described hereinabove in this section, except that once the person has entered upon the leave of absence or parole, the board shall have the administration of the terms and conditions of the leave or parole as set by the Court. If the person before the court is returned to the custody of the Institution as a defective delinquent, it shall continue to be for an indefinite period, without either maximum or minimum limits, subject to the review and reexamination by the institutional board of review, as provided hereinabove in this section. (An. Code, 1951, § 13; 1951, ch. 476, § 13; 1957, ch. 762; 1961, ch. 629, § 1; 1970, ch. 392.)

APPLICATION

§ 14. Not to affect juvenile courts; adults convicted in juvenile courts.

Nothing in this article shall be construed to extend to or affect any case in a juvenile court or in the court of a magistrate for juvenile causes, or any person involved in such case, unless the juvenile court judge shall have waived jurisdiction in the case so that it may be heard and adjudicated in a regular criminal court. Provided however, that the provisions of this article shall apply to any adult who has been found guilty and sentenced by one of the several juvenile courts in this State when said juvenile court is exercising its original jurisdiction as provided in §§ 53 and 55 of Article 26 of the Annotated Code of Maryland. (An. Code, 1951, § 14; 1951, ch. 476, § 14; 1959, ch. 643; 1961, ch. 629, § 1.)

§ 15. Not to affect magistrate courts; Baltimore City.

Nothing in this article shall be construed to extend to or affect any case in the court of a magistrate or justice of the peace, or any person involved in such case, unless by reason of a request for a jury trial or for other cause the case shall be heard and adjudicated in a regular criminal court. Provided, however, that the Criminal Court of Baltimore City shall have jurisdiction of a person convicted and sentenced by the Municipal Court of Baltimore City if the crime, offense, crimes or offenses, for which he has been convicted and sentenced are within one or more of the categories listed in § 6 of this article. (An. Code, 1951, § 15; 1951, ch. 476, § 15; 1961, ch. 629, § 1.)

ADMINISTRATIVE PROVISIONS

§ 16. Certain transfers between institutions.

(a) *Person sentenced for offense committed prior to June 1, 1954.* — Any person imprisoned on a sentence for a crime

or offense committed before June 1, 1954, may, by agreement between the Department of Correction and Patuxent Institution and without court proceedings, be transferred to Patuxent Institution for examination as a possible defective delinquent and, if so diagnosed, may by similar agreement be detained there for the duration of his sentence or any part thereof.

(b) *Transfer to Institution for employment.* — Any person in the custody of the Department of Correction may be transferred to Patuxent Institution for employment there by agreement between the Institution and the Department of Correction.

(c) *Diminution of sentence.* — The sentence of any person transferred to Patuxent Institution under the provisions of this section shall be subject to the same diminution for behavior, work and training as though said person had remained in the custody of the Department of Correction.

(d) *Transfer from Institution for employment, treatment or imprisonment.* — Any person in the custody of Patuxent Institution may be transferred, by agreement between the Institution and the Department of Correction, to the custody of the Department of Correction for employment on a prison farm or in any work project or for hospitalization or for other treatment for illness or for imprisonment; provided, however, that except in cases of transfer for hospitalization or treatment for illness it shall first be found by the institutional board of review that such transfer will not reduce or retard the prospect of such person's release from confinement as a defective delinquent, and provided further that such person, notwithstanding transfer, shall remain committed to Patuxent Institution and shall be returned there at least annually for reexamination

by the institutional board of review. (An. Code, 1951, § 16; 1951, ch. 476, § 16; 1953, ch. 516; 1955, ch. 244; 1961, ch. 629, § 1.)

§ 17. Supplying goods, wares, merchandise and produce to "consuming institutions."

The board of Patuxent Institution is hereby empowered to determine from time to time whether, and to what extent, persons in the custody of said Institution and selected by its director, shall supply goods, wares, merchandise and produce required to be purchased by "consuming institutions" as defined in Article 27, § 680 of the Annotated Code of Maryland. All such activities shall be conducted in accordance with the provisions of Article 27, § 680 of the Annotated Code of Maryland. (1961, ch. 629, § 1.)

§ 18. Record of inmate.

(a) *Description recorded; photograph; Bertillon method.* — Said Institution shall record or cause to be recorded a description of every person committed to it as a defective delinquent, as full and complete as may be obtainable, and shall attach thereto as part of said record a photograph or photographs of such person. For the purpose of obtaining accurate descriptions of such persons, the director is hereby authorized to adopt the Bertillon method of measurement and registration or such other method as shall be adequately descriptive.

(b) *Criminal history forwarded by State's attorney.* — In order to accomplish the purposes of subsection (a), the State's attorney of any county or city, in which any person has been found to be a defective delinquent, is hereby directed to forward promptly to said Institution and upon blanks furnished by it, a criminal history of such person as

fully as the same is known or can be ascertained by such State's attorney.

(c) *Accessibility of record; admissible in evidence.* — The record herein provided for shall not be made public except as may be necessary in the identification or trial of persons accused of crime and except as provided in this section. The record shall be accessible, however, to any officer of any court having criminal jurisdiction in this State, upon the order of the judge of said court, or of the State's attorney, which said order shall be attested by the seal of the court. Whenever, in the trial of any person, the fact of previous conviction of any person for any crime may be admissible, any such record shall be admissible in evidence for the purposes of proving the fact of the conviction and the crime for which such defective delinquent was convicted.

(d) *Copy to warden or other officer in reciprocal state.* — A copy of such record shall be furnished, upon request, to any warden or other officer in charge of a prison for felons in any other state of the United States; provided that such state has made reciprocal provisions by law for furnishing records of its convicted criminals to the authorities of this State.

(e) *Copy to police officer upon signed order.* — Said Institution shall furnish a copy of such record of any defective delinquent to any police officer presenting an order for such copy signed by the officer in charge of police of any county or municipality.

(f) *Trial data forwarded by clerk; fee.* — Whenever a person shall be convicted of crime and committed to the said Institution, the clerk of the court involved shall, unless advised by said Institution that records are available from the Department of Correction, make and forward as

soon as practicable, but not later than thirty days from time of commitment, to said Institution, a record containing, with regard to the criminal trial, a short copy of the docket entries, the name and address of the judge presiding at the trial, the State's attorney and sheriff, and the names and addresses of the jurors and the names of the witnesses sworn on the trial, together with a statement of any facts which the presiding judge may deem important or necessary for a full comprehension of the case. In each case in which he shall perform the duties required by this section, the clerk of the court shall be entitled to one dollar as compensation, which shall be taxed as a part of the costs of said case.

(g) *Interchange of records and information.* — For the purpose of increasing the efficiency in the treatment, management and rehabilitation of persons committed to said Institution there shall be full and complete interchange between said Institution and the Departments of Correction and of Parole and Probation of records and all pertinent information relating to each of the persons so committed. It shall be the duty of said Department to provide the procedures and methods for the interchange of the records and information as required by this section. (1961, ch. 629, § 1.)

§ 19. Federal grants or loans.

Upon the approval of the Board of Public Works, the board of Patuxent Institution is hereby empowered in its discretion to apply for and receive from the federal government or any board, bureau, commission, department or other agency thereof any funds, chattels, or foodstuffs by way of grant or loan that may be available to be used in the establishment, maintenance or program of the said Institution. (1961, ch. 629, § 1.)

SUPPLEMENT

ARTICLE 31B

DEFECTIVE DELINQUENTS

§ 6. Requests for examination.

(c) *When requests may be made.* — Such an examination may be requested and made at any time after the person has been convicted and sentenced for a crime or offense specified hereinabove in this section, provided that the said person has been sentenced to a period of confinement in a penal institution or is then serving such a sentence. No such examination shall be ordered or made if the said person has been released from confinement for the particular crime or offense of which he was convicted or who is within six months of the expiration of his sentence.

(e) *Custody after examination ordered; jurisdiction of defendant.* — After the court has ordered an examination to be made under this section, said person shall be retained in custody, initially of the Department of Correction until his transfer to Patuxent Institution and thereafter in the custody of Patuxent Institution, until such time as the procedures of this subtitle for the determination of whether or not said person is a defective delinquent have been completed, without regard to whether or not the criminal sentence to which he was last sentenced has expired. The court which last sentenced the defendant, whether or not the term of court in which he was sentenced has expired shall retain jurisdiction of the defendant for the purpose of any of the procedures specified in §§ 6, 7, 8, or 9 hereof, except that the Criminal Court of Baltimore City and the Circuit Court of Anne Arundel County shall for such purposes have jurisdiction of a person last sentenced by the Municipal Court of Baltimore City and the People's Court of Anne Arundel County, respectively. (1971, ch. 491.)

§ 7. Examinations.

(a) *By whom made; report of findings to court; time spent in institution, etc., credited on sentence.* — Any such examination shall be made by at least three persons on behalf of the institution for defective delinquents, one of whom shall be a medical physician, one a psychiatrist, and one a psychologist. They shall assemble all pertinent information about the person to be examined, before proceeding therewith, including a complete statement of the crime for which he has been sentenced, the circumstances of such crime, the court in which he was sentenced, the nature of the sentence, copies of any probation or other reports which may have been made about him, and reports as to his social physical, mental and psychiatric condition and history. On the basis of all the assembled information, plus their own personal examination and study of the said person, they shall determine whether in their opinion, or in the opinion of a majority of them, the said person is or is not a defective delinquent. They shall state their findings in a written report addressed to the court, not later than six months from the date said person was received in the Institution for examination, or three months, before expiration of his sentence, whichever first occurs. If the substance of the report is that the said person is not a defective delinquent, he shall be retained in the custody of the Department of Correction under his original sentence as if he had not been examined for possible defective delinquency. Provided, however, that the said person shall be returned to the custody of the Department of Correction with full credit for such time as he has already spent in the institution for defective delinquents or within the custody of the Department of Correction including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may

determine under the provisions of § 688 of Article 27 of the Code. (1971, ch. 491.)

§ 9. Sentence.

(a) *When defendant found not to be a defective delinquent.* — If the court or the jury, as the case may be, shall find and determine that the said defendant is not a defective delinquent, the court shall order him returned to the custody of the Department of Correction, and he shall begin or resume his period of confinement on said conviction as if he had not been examined for possible defective delinquency. Provided, however, that the said defendant shall be returned to custody under his original sentence with full credit for such time as he has already spent in the institution for defective delinquents or within the custody of the Department of Correction including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of § 688 of Article 27 of the Code. (1971, ch. 491.)

INSTITUTIONAL BOARD OF REVIEW

§ 13. Duties.

(b) *Review and reexamination of defective delinquents.* — The institutional board of review shall review and thoroughly reexamine every person held in custodial care as a defective delinquent, not less frequently than once in every calendar year. Such review and reexamination shall be to determine whether such person shall remain classified as a defective delinquent, and in making such determination the board shall assemble such information, use such tests and follow such procedures as then are being utilized to indicate the presence of defective delinquency. The board shall make a recommendation for the future status and treatment of each person so reviewed and reexamined, in writing, and a copy of every such recommendation shall be filed with the records of the Institution. (1971, ch. 15.)

APPENDIX B

Crime Prevention by the Indeterminate Sentence Law

By Emory F. Hodges, M.D.

Amer. J. Psychiat. 128:3, September 1971

This paper reports the first 11 and a half years' experience under Maryland's defective delinquent statute, which utilizes a unique approach in the treatment of dangerous offenders. The author estimates that without the law, about 1,500 additional crimes would have been committed by prisoners after their release if they had been sent to regular prisons rather than the Patuxent Institution. He believes the indeterminate sentence, which is an integral part of the statute, protects society from the defective delinquent and handles him both effectively and humanely.

In 1951 the legislature of the State of Maryland enacted a statute on defective delinquents. This law, unique in the American treatment of dangerous offenders, was based on three key features.

1. It established a procedure for the determination of a class of criminals known as defective delinquents, who are diagnosed and treated by psychiatrists and other health professionals.

2. It established the Patuxent Institution, where defective delinquents are housed in a setting that combines the security of a prison with the therapeutic milieu of a mental hospital.

3. It provided that a defective delinquent would be committed for as long as he was deemed a danger to society.

Read at the 124th annual meeting of the American Psychiatric Association, Washington, D.C., May 3-7, 1971.

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Called an indeterminate sentence, this is analogous to the indefinite commitment of the mentally ill.

The law defines a defective delinquent as "an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment"(1).

Under the defective delinquent statute, any person may be referred for examination as a possible defective delinquent who has been convicted and sentenced in a Maryland court of record for one or more of the following: a felony; a penitentiary misdemeanor; a crime of violence; a sex crime involving force or violence, disparity of age, or acts of an uncontrolled, repetitive nature; or two or more convictions in the State of Maryland for crimes punishable by imprisonment.

From this definition two broad classes of defective delinquents may be identified: those who may be mentally and at the same time socially deficient; and those who may be described as "sociopathic personalities" — persons who are intelligent but are compulsively, repeatedly, and/or dangerously criminal in their behavior.

In the same research report (1) the intent of the Maryland legislature in passing this statute was described as follows:

> The primary purpose of such legislation is to protect society from this segment of the criminal population who will probably again commit crimes if released on

> the expiration of a fixed sentence; and thus they should be detained and specially treated unless and until cured. A secondary purpose is more effectively and humanely to handle them, which aids in the cure, where possible. A further benefit to Maryland will be the opportunity for study of the problem through the concentration in the new institution (Patuxent) of the defective delinquents under indeterminate sentence and the possibility, which has not previously existed, of obtaining our own statistics, which will be valuable in the future handling of the problem.

The defective delinquent law has rested on the assumption that a segment of the criminal population that probably would commit future crimes if released after a fixed sentence could be identified. Although the law became operative with the opening of Patuxent in January 1955, no follow-up study to confirm or refute this basic assumption had been made. Intrigued with the potential benefits both to society and the individual offender, the author in 1969 sought and was granted permission by the Board of Patuxent Institution to conduct such a study.

Method

The essence of the follow-up was to determine the number of men diagnosed as defective delinquents who committed further offenses after release from custody. As will be seen, these men fell into several legal categories. The first step therefore was to review the Patuxent files and list the names and dates of the men admitted, committed, and released.

For a follow-up to be meaningful one must allow a reasonable span of time before observing for a given phenomenon. To include men newly released from custody would create a bias. So the question of how long it takes

for most recidivists to repeat was posed. Other studies proved useful in deciding this question.

A prior study (2) on all of the 151 parolees from Patuxent through April 15, 1966, showed that of a total of 91 violators, all but two had committed their violations within three years of parole. Federal Bureau of Investigation studies on careers in crime have shown that over 91 percent of serious crime recidivists commit their violations within the first three years after release (3). Therefore the decision was made to follow up only those men who had been released from custody prior to July 1966. This ensured that every man in the follow-up had the opportunity to have been at liberty for at least three years during which time a postrelease offense might have occurred. In fact, most men had been at risk considerably longer than three years.

Next, reports were obtained from national (FBI), state, and local agencies to determine if postrelease offenses had occurred. Since the mobility of offenders is high, the FBI report was selected as the primary data source; in the few cases where these were unavailable or incomplete, state or local records were utilized. Recidivism was based on a postrelease conviction for one or more felonies and/or misdemeanors. In the many cases that showed more than one recidivist offense, the nature of the most serious offense was recorded.

Results

From the opening in January 1955 through June 30, 1966, 1,340 diagnostic evaluations were made at Patuxent. The staff recommended that 896 persons be committed as defective delinquents. Court hearings resulted in 156 findings of "not found defective delinquent" and 740 commitments as defective delinquents.

The 156 men adjudicated "not defective delinquent" were returned to the Department of Corrections to serve out their original sentences. Since they were only evaluated at Patuxent and were not exposed to the treatment program, we shall refer to these men as the "untreated" group.

Of the 740 commitments to Patuxent there were: 1) 26 men later released on legal technicalities; 2) 198 men released on subsequent court rehearings (inasmuch as these men entered the treatment program but were released by the court against Patuxent's advice, they constitute a "partially treated" group); and 3) 516 men who had court rehearings that did not result in release. Of this latter number, 156 improved enough to earn parole, while 360 others were still in confinement as of June 30, 1966. Since the Institutional Board of Review, on the recommendation of the staff, decides when a man should be granted parole, this group can be considered as "fully treated."

Using data on first admissions only, there were 129 men in the untreated group, 162 in the partially treated group, and 156 in the parole group (see table 1). Omitting the

TABLE 1

Postrelease Follow-Up

Disposition	*Untreated Group*	*Partially Treated Group*	*Fully Treated Group (Parolees)*
Convicted of new offense	95	111	57
No new offense	23	45	99
Charged, disposition unknown	11	6	—
Subtotal (men on first release)	129	162	156
Multiple releases	4	25	—
Died	4	6	—
Still confined by Department of Corrections on June 30, 1966	19	5	—
Subtotal (others)	27	36	—
Total	156	198	156

uncertain cases in which persons were charged with an offense but the disposition was unknown, we find that recidivism occurred in 81 percent of the untreated group, 71 percent of the partially treated group, and in only 37 percent of the fully treated group. A comparison of the fully treated group with the untreated and partially treated groups gives a chi square of 54 and 40 respectively. Each of these values has a probability of .01, which is, of course, statistically significant.

Of the recidivists in the untreated group, 79 had committed one or more felonies, while 16 had been convicted of misdemeanors only. Of the partially treated group, 89 were convicted of felonies and 22 of misdemeanors only. Forty-two parolees had postrelease felonies, while 15 had misdemeanors only (see table 2).

TABLE 2

Recidivism by Type of Offense

Offense	Untreated		Partially Treated		Fully Treated (Parolees)	
	No.	%	No.	%	No.	%
Felony	79	87	89	80	42	74
Misdemeanor only	16	13	22	20	15	26
Total	95		111		57	

An analysis of the types of felonies, based on the FBI crime index, appears in table 3. This index consists of personal crimes such as murder, forcible rape, robbery, and aggravated assault; and crimes against property such as burglary, larceny of goods valued at $50 or more, and auto theft. Maryland law defines larceny as a felony when the value of the stolen property is $100 or more; only such cases were scored as felonies in this study.

The felonies in the untreated group included 39 personal crimes and 40 property crimes. The partially treated

TABLE 3

Types of Felony Offenses

Item	Untreated Group	Partially Treated Group	Fully Treated Group (Parolees)
Personal offenses			
Murder, manslaughter	3	1	2
Rape	2	3	1
Robbery	11	9	6
Aggravated assault	17	14	4
Other	6	3	2
Subtotal	39(49%)	30(34%)	15(36%)
Property offenses			
Burglary	16	29	14
Larceny	8	7	5
Car theft	10	15	2
Other	6	8	6
Subtotal	40(51%)	59(66%)	27(64%)
Total	79	89	42

group had 30 personal and 59 property offenses, while the fully treated group showed 15 personal and 27 property offenses. The higher proportion of personal offenses in the untreated group compared to the partially treated group is significant at the .05 level of probability; the same comparison with the fully treated group falls short of statistical significance.

Turning now to the group of 156 parolees, we note that 99 had no new offenses. Part of this rather favorable outcome is undoubtedly due to the policy of revoking the parole of those men who have violated their parole terms. Thus of the 99 men with no new offenses, 31 had to return to the institution for further treatment. Many of these later earned parole status again. It should be mentioned

that parole is a carefully supervised experience and may include weekend furloughs, a work-out, live-in program, a study program, and a halfway house. Also among the 99 parolees with no new offenses were 30 men who had gained complete release from parole.

Reviewing the first eight years of the Patuxent Institution in 1963, Boslow (4) reported that of 81 persons paroled, only 35 percent had committed new offenses. The current finding that 37 percent of 156 parolees had new offenses suggests that the Patuxent staff is maintaining rather consistent criteria for granting parole. These recidivist rates, as Boslow has observed:

> . . . deviate significantly from the anticipated national recidivism rate, which is usually quoted as between 65 percent and 70 percent. However, there is no other institution in this country comparable to Patuxent with its indeterminate parole system. When one considers the severe behavior disorders that are found in our particular population, the fact that, by definition, our population is composed of recidivists whose prognosis for successful rehabilitation would be quite guarded, these figures become even more impressive (4).

It should be noted also that 80 percent of the 210 felony recidivists were released through court initiative, compared to 20 percent released on parole by the Patuxent staff. It would seem that if the judges and juries had accepted the recommendations of the staff more often, the number of recidivists woud have been smaller.

Discussion

The findings show that of a total of 807 men diagnosed as defective delinquents on first admission, 263 committed postrelease offenses; 95 of these recidivists came from the untreated group, 111 from the partially treated group, and 57 from the fully treated group.

Let us now ask how many recidivists there would have been in the same group of men if there had been no law on defective delinquents in Maryland. The fact is that 81 percent of the group adjudicated as "not defective delinquents" did become recidivists. It seems reasonable to assume that the group committed by the courts as defective delinquents would have produced at least as high a percentage of recidivists as the group that was not committed. Without the statute, the 807 men diagnosed as defective delinquents would have served fixed sentences in the Department of Corrections. An 81 percent recidivist rate in this group would have produced 654 recidivists.

The difference between the 654 recidivists expected without this law and the 263 actual recidivists is 391; this represents the approximate number of recidivists the law may be said to have prevented through June 1966. Now, nearly five years later, I estimate the number of recidivists that the law has prevented to be well over 500.

Since the data show that the average recidivist has been convicted of several postrelease offenses, the number of crimes that have been definitely prevented in this group was estimated at over 1,000 through June 1966. By now this figure could easily have reached 1,500. Recalling that there are on the average several unsolved offenses for every conviction, the volume of prevented crimes would seem to be even higher. The effect of the law is of course cumulative, and each year adds a large increment to the volume of crime that this law is preventing. FBI data on mobility of felony offenders strongly suggests that well over half of these prevented crimes would have occurred outside of Maryland (3). Thus the benefits of this law have accrued to many states.

The data from this study tend to confirm the assumption that it is possible to identify a segment of the criminal population that probably will commit crimes if released after a fixed sentence. The indeterminate sentence law appears to have been reasonably successful in achieving the dual purpose of protecting society from the defective delinquent while simultaneously handling him more effectively and humanely.

The Maryland legislature displayed great foresight 20 years ago in recognizing the need for obtaining its own statistics, which it thought would be valuable in the future handling of the problem. These statistical findings can benefit not only the State of Maryland but other states whose legislatures are seeking methods to decrease crime by reducing recidivism among known offenders. Even if other states were to build similar institutions at once, it would be some years before these programs could be evaluated meaningfully. Meanwhile Patuxent, with more than 16 years' experience, is able to demonstrate the long-term results of the indeterminate sentence. The pattern thus far indicates that the law is preventing a larger volume of crime each year, while the treatment program at Patuxent is significantly more effective in rehabilitating its inmates than other methods have been with this type of offender.

In January 1971 the Fourth Circuit Court of Appeals upheld the constitutionality of the defective delinquent statute, bringing closer a final decision by the Supreme Court. If the statute is again upheld, and since the effectiveness of the law has now been demonstrated, I predict that most states will enact a similar statute within the next five to eight years. I further predict that 20 years hence psychiatric historians will regard this statute as one of

the major accomplishments of the middle third of the 20th century.

Acknowledgments

This report would be incomplete without saluting the key men who produced this medicolegal tour de force. Judge Jerome Robinson, when he was serving in the state legislature, developed the concept of the indeterminate sentence in the form that eventually became law. Several psychiatrists, including Drs. Manfred Guttmacher and John Whitehorn, played major roles in urging passage of this measure. Dr. G. Kenneth Reiblich, then Professor of Law at the University of Maryland, drafted the statute after extensive research. Finally, the success that has been achieved is due in large measure to the tireless efforts of Dr. Harold Boslow, the Director of Patuxent.

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